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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

ALLEN I. HIRSCH
Arnall Golden & Gregory
Suite 400
55 Park Place
Atlanta, Georgia 30335
(404) 577-5100
Counsel for Petitioners

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

PETITION FOR CERTIORARI FILED MAY 27, 1983

CERTIORARI GRANTED JUNE 11, 1984

BEST AVAILABLE COPY

ALLEN I. HIRSCH
SIMON A. MILLER
ROBERT L. ROTHMAN
Arnall Golden & Gregory
Suite 400
55 Park Place
Atlanta, Georgia 30335
(404) 577-1500
Counsel for Petitioner,
Southern Motor Carriers
Rate Conference, Inc.

BRYCE REA, JR.
PATRICK MCELIGOT
Rea, Cross & Auchincloss
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700
Counsel for Petitioner,
North Carolina Motor
Carriers Association, Inc.

WILLIAM PAUL RODGERS, JR.
General Counsel
CHARLES D. GRAY
Assistant General Counsel
1102 ICC Building
P.O. Box 684
Washington, D.C. 20044
(202) 628-7324
Counsel for Petitioner,
National Association of
Regulatory Utility Commissioners

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JOINT APPENDIX

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	iii
Complaint, Filed November 7, 1976	1
Answer of North Carolina Motor Carriers Rate Association, Inc. ("NCMCA"), Filed January 17, 1977 ...	15
Answer of Defendant Southern Motor Carriers Rate Conference, Inc. ("SMCRC"), Filed January 17, 1977 .	23
Stipulation Correcting Paragraph 27(a) of Complaint, Filed March 8, 1977	36
Stipulation of Facts, Filed May 8, 1978	39
Order Allowing Intervention by NARUC, Filed May 10, 1978	43
Affidavit of J. C. Turner, Filed July 31, 1978	50
Affidavit of I. H. Hinton, Filed July 31, 1978	55
Affidavit of James C. Harkins, Filed August 8, 1978 ..	62
Affidavit of Andrew C. Rymer, Filed September 15, 1978	79
Affidavit of Robert A. Jones, Filed September 15, 1978	86
Order of District Court Granting Plaintiff's Motion for Summary Judgment, Filed March 20, 1979 ..... Pet. App.	1a
Final Judgment of District Court, Filed September 13, 1979	93
Panel Opinion of Court of Appeals, Filed April 5, 1982 ..... Pet. App.	31a
Order of Court of Appeals directing Rehearing *En Banc*, Filed June 7, 1982 ..... Pet. App.	61a
Opinion of Court of Appeals on Rehearing *En Banc*, Filed April 11, 1983 ..... Pet. App.	63a
Order of Court of Appeals Granting Stay of Mandate, Filed May 6, 1983 ..... Pet. App.	94a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 17, 1976 - Plaintiff's Complaint filed in U.S. District Court for the Northern District of Georgia, Atlanta Division.

December 8, 1976 - Answer of Defendant Motor Carriers Traffic Association, ("MCTA") and Motion of MCTA to Dismiss, filed.

January 17, 1977 - Answer of Defendant North Carolina Motor Carriers Association, Inc. ("NCMCA") and Motion of NCMCA to Dismiss, filed.

January 17, 1977 - Answer of Defendant Southern Motor Carriers Rate Conference, Inc. ("SMCRC") and Motion of SMCRC to Dismiss filed.

March 7, 1977 - Plaintiff's Motion to Strike certain affirmative defenses from Answers, filed.

March 8, 1977 - Stipulation correcting typographical error in Complaint, filed.

July 11, 1977 - Order entered denying Defendant's Motion to Dismiss, granting in part and denying in part Plaintiff's Motion to Strike Certain Affirmative Defenses from Answers and inviting Attorneys General of five states to participate as Amici Curiae.

September 1, 1977 - Motion of the National Association of Regulatory Utility Commissioners ("NARUC") for leave to intervene as Defendant, filed.

September 9, 1977 - Order entered granting NARUC's Motion to Intervene.

September 9, 1977 - Answer of NARUC filed.

September 16, 1977 - Plaintiff's Memorandum in Opposition to NARUC's Motion for Leave to Intervene, filed.

September 19, 1977 - Plaintiff's Motion for Reconsideration regarding intervention by NARUC, filed.

October 21, 1977 - Amicus Curiae Brief of State of Alabama and Alabama Public Service Commission, filed.

October 21, 1977 - Amicus Curiae Brief of State of Georgia and Georgia Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Response of the Tennessee Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Response of the State of Mississippi and the Mississippi Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Brief of North Carolina and North Carolina Utilities Commission, filed.

November 9, 1977 - Motion of National Motor Freight Traffic Association, Inc. ("NMFTA") to intervene as Defendant.

November 16, 1977 - Plaintiff's Memorandum in Opposition to Motion of NMFTA for Leave to Intervene, filed.

December 30, 1977 - Order entered denying NMFTA's Motion to Intervene.

May 10, 1978 - Order granting NARUC's Motion to Intervene as Defendant to represent the five state commissions.

May 8, 1978 - Stipulation of certain facts, filed.

July 31, 1978 - Defendant NCMCA's Motion for Summary Judgment, filed.

August 1, 1978 - Defendant's SMCRC's Motion for Summary Judgment, filed.

August 1, 1978 - Defendant's NARUC's Motion for Summary Judgment, filed.

August 1, 1978 - Plaintiff's Motion for Summary Judgment, filed.

August 2, 1978 - Defendant MCTA's Motion for Summary Judgment, filed.

August 8, 1978 - Amicus Curiae Brief of NMFTA Supporting Defendant's Motion for Summary Judgment, filed.

September 29, 1978 - Order entered deferring Motions for Summary Judgment and granting parties thirty (30) days to brief issues in Order.

March 20, 1979 - Order entered granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

April 4, 1979 - Order entered providing that March 20, 1979 Order is not a final decision for purpose of appeal.

April 25, 1979 - Motions by Defendants SMCRC and NCMCA for Reconsideration of Order of March 20, 1979 filed.

September 13, 1979 - Order entered denying Defendants' Motion for Reconsideration.

September 13, 1979 - Final Judgment entered.

September 21, 1979 - Order entered staying Final Judgment until October 10, 1979.

October 11, 1979 - Order entered granting Defendants' Motion for Stay of Final Judgment pending appeal.

November 9, 1979 - Defendant NCMCA's Notice of Appeal, filed.

November 9, 1979 - Defendant SMCRC's Notice of Appeal, filed.

November 13, 1979 - Defendant NARUC's Notice of Appeal, filed.

April 5, 1982 - Opinion of the Court of Appeals for the Fifth Circuit, Unit B.

April 19, 1982 - Motions for Rehearing *en banc* by SMCRC, NCMCA and NARUC, filed.

June 7, 1982 - Order entered by Court of Appeals directing cause to be reheard by Unit B of Fifth Circuit, *en banc*.

April 11, 1983 - Opinion of the Court of Appeals for the Fifth Circuit, Unit B, *en banc*.

May 6, 1983 - Order of the Court of Appeals for the Eleventh Circuit granting stay of mandate pending petition for writ of certiorari granted through May 30, 1983.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C76-1909A
Filed: 11/17/76

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;

MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION OF TITLE 15 U.S.C. § 1, SHERMAN ANTITRUST ACT

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above named defendants, and complaints and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1).

2. Southern Motor Carriers Rate Conference, Inc., is corporation licensed to do business under the laws of the State of Georgia and transacts business and is found within the Northern District of Georgia, Atlanta Division.

II.

DEFINITIONS

3. As used herein, the term:

(a) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306, Georgia Intrastate Tariff 301, Mississippi Intrastate Tariff 303, North Carolina Intrastate Tariff 304, and Tennessee Intrastate Tariff 305, and all respective supplements thereto; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-F and all respective supplements thereto; and all predecessor tariffs of the aforesaid tariffs which were effective within the period covered by this Complaint.

(b) "For-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a federal or state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(c) "Intrastate for-hire transportation" means for-hire transportation between origin and destination points wholly within a state.

(d) "Private transportation" means the transportation and delivery of property by a shipper (manufacturer or merchant) performed with motor

vehicles and personnel under control of the shipper. Such transportation is incidental to the primary business purpose of the shipper and is economically unregulated under federal and state law.

(e) "Person" means any natural person, firm, individual proprietorship, partnership, association or corporation.

(f) "Southern Territory" means the States of Alabama, Florida, Georgia, Kentucky, Louisiana (east of the Mississippi River), Mississippi, North and South Carolina, Tennessee, the southern portion of Virginia, and a small part of West Virginia.

III.

DEFENDANTS

4. Southern Motor Carriers Rate Conference, Inc., (hereinafter referred to as "SMCRC") is made a defendant herein. SMCRC is a corporation organized and existing under the laws of the State of Georgia, and has its principal offices in Atlanta, Georgia. SMCRC publishes and issues intrastate rates applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, respectively, on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within these states.

5. Motor Carriers Traffic Association, Inc., (hereinafter referred to a "MCTA") is made a defendant herein. MCTA is a corporation organized and existing under the laws of the State of North Carolina, and has its principal offices in Greensboro, North Carolina. MCTA publishes and issues intrastate rates applying within North Carolina on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within North Carolina.

6. North Carolina Motor Carriers Association, Inc., (hereinafter referred to as "NCMCA") is made a defendant herein. NCMCA is a corporation organized and existing under the laws of the State of North Carolina, and has its principal offices in Raleigh, North Carolina. NCMCA publishes and issues intrastate rates applying within North Carolina on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within North Carolina.

IV.

CO-CONSPIRATORS

7. Various persons not made defendants herein, participated as co-conspirators with the defendants in the violation alleged herein, and performed acts and made statements in furtherance thereof.

V.

TRADE AND COMMERCE

8. Truck transportation is an important transport mode in the movement of property in the United States. In 1974, approximately 22 percent of all property transported in the United States was moved by motor carriers. If bulk commodities are excluded, truck transportation is the dominant mode utilized for the movement of property in the United States.

9. Motor Carriers engaging in for-hire transportation of property across state boundaries do so under certificates of public convenience and necessity granted by the Interstate Commerce Commission (hereinafter referred to as "ICC") (49 U.S.C.§ 306). Such motor carriers are subject to ICC rate regulation and must establish, observe and enforce just reasonable rates (49 U.S.C. § 316(b)).

10. Two or more motor carriers engaged in for-hire transportation of property across state bounderies may apply to the ICC for approval of a rate agreement and a rate-making conference (49 U.S.C. § 5b(2)). Upon ICC approval, parties to such an agreement made and carried out according to its provisions and terms and in conformity with the terms and conditions prescribed by the ICC are relieved from the operation of the antitrust laws (49 U.S.C. § 5b(9)).

11. The ICC may not in any manner or for any purpose regulate the rates charged for intrastate for-hire transportation of property (49 U.S.C.§§ 302(b) and 316(e)).

12. Motor carriers engaged in intrastate for-hire transportation of general commodities within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, do so under certificates of public convenience and necessity granted by state regulatory agencies in the respective states. Such motor carriers are subject to rate regulation by a state agency and are required to charge just reasonable rates.

13. The respective statutes which provide for regulation of motor carriers engaged in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee do not command, authorize or otherwise provide for the establishment, operation or regulation of rate agreements among such motor carriers or motor carrier rate-making conferences.

14. On or about January, 10, 1956, SMCRC received ICC approval to operate as a ratemaking conference. SMCRC member carriers are parties to rates published by SMCRC for for-hire transportation of property across state boundaries between, and from and to, points in the Southern Territory.

15. On or about October 2, 1957, MCTA received ICC approval to operate as a rate-making conference. MCTA member carriers are parties to rates published by MCTA for for-hire transportation of property across state boundaries between, and from and to, points in the Southern Territory.

16. In 1973, motor carriers which participated in intrastate rates published by SMCRC, MCTA and NCMCA for intrastate for-hire transportation of general commodities derived aggregate revenues thereunder in excess of $80,000,000.

17. Shippers engaging in private transportation across state boundaries utilized motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Such shippers combine their own private interstate transportation with intrastate for hire transportation to effectuate the necessary movement of general commodities. Upon arrival in one of these states, shippers transfer their freight to one or more of said motor carriers who then transport and deliver the general commodities intrastate to customers and destinations predesignated by the shippers at the commencement of the interstate movement. In this way, general commodities are transported in a continuous, uninterrupted stream from out-of-state origin points to destinations within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. The said motor carriers perform such transportation services in the stream or flow of interstate commerce and constitute an essential and integral part of that flow. Such activities of said motor carriers have a substantial and direct effect upon the aforesaid interstate commerce.

18. For intrastate deliveries of general commodities shipped by shippers engaged in private transportation

across state boundaries, motor carriers charge the intrastate rates published by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. In 1975, said motor carriers made such intrastate deliveries to destinations within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee of general commodities valued in excess of $53,930,000 and earned revenues therefrom of approximately $500,000.

19. Shippers utilize intrastate for-hire transportation services of motor carriers within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee to move general commodities from warehouses and distribution centers to customers located in the same state as the warehouse or distribution center. These general commodities are transported from out-of-state origin points to such warehouses and distribution centers for distribution within said states and for reshipment interstate. Shippers also utilize said motor carriers for intrastate for-hire transportation of general commodities, which the shippers manufacture or process within said states, to customers located in the same state as the manufacturing or processing facilities. A substantial portion of the essential raw materials and supplies used directly in the manufacturing or processing of these general commodities moves in a continuous and uninterrupted flow from out-of-state origin points into the manufacturing or processing facilities in each of said states and then as manufactured general commodities are delivered intrastate to customers within said states and to interstate customers.

20. For intrastate deliveries of general commodities from warehouses, distribution centers and manufacturing or processing facilities, said motor carriers charge shippers or shippers' customers the intrastate rates pub-

lished by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Said intrastate shipping charges are factors which influence the national and local product prices of such general commodities and influence supply, demand and other competitive business decisions of such shippers. The intrastate delivery services of these motor carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, said activities of these motor carriers have a substantial and direct effect upon the aforesaid interstate commerce.

21. In 1975, more than $800,315,000 worth of general commodities and an additional amount of general commodities weighing more than 1,300,190,000 pounds were moved by shippers from out-of-state origins into warehouses and distribution centers located within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. From said warehouses and distribution centers said motor carriers delivered intrastate more than $360,794,000 worth of these general commodities and an additional amount of general commodities weighing more than 300,667,000 pounds. During the same year, more than $502,141,000 worth of raw materials and supplies and an additional amount of raw materials and supplies weighing more than 808,941,000 pounds were moved by shippers from out-of-state origins into their manufacturing or processing facilities located within the said states. From these manufacturing and processing facilities, said motor carriers delivered intrastate more than $203,095,000 worth of general commodities and an additional amount of general commodities weighing more than 150,434,000 pounds.

22. Since said motor carriers engage in intrastate for-hire transportation of general commodities in a five-state region comprised of Alabama, Georgia, Mississippi,

North Carolina, and Tennessee, and charge the intrastate rates of SMCRC, MCTA and NCMCA within said region, their transportation services and charges necessarily have a direct and substantial effect on the general commodities which flow across and into this five-state region.

23. Certain motor carriers which engage in intrastate for-hire transportation of general commodities and which charge for this service the intrastate rates published by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, also engage in for-hire transportation of general commodities across state boundaries. For many of these motor carriers, their system-wide operations—combined interstate and intrastate operations—are directly affected by their intrastate traffic.

VI.

VIOLATION ALLEGED

24. Beginning sometime in the early 1940's, the exact date being to plaintiff unknown, and continuing to the date of this Complaint, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforementioned trade and commerce in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

25. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been

and are that they agree to raise, fix, stabilize and maintain rates charged for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee.

26. In furtherance of the aforesaid combination and conspiracy, defendants and co-conspirators have done and continue to do those things which they have combined and conspired to do, including among other things, the following:

(a) Maintain intrastate rate committees made up of carriers in Alabama, Georgia, Mississippi, North Carolina, and Tennessee to consider and pass upon intrastate rate proposals;

(b) Utilize the personnel and facilities of SMCRC, MCTA and NCMCA for intrastate rate-fixing purposes;

(c) Participate in the collectively set intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(d) Coordinate intrastate rate-fixing activities among SMCRC, MCTA, and NCMCA;

(e) Utilize SMCRC personnel and facilities in Atlanta, Georgia, to compile and prepare traffic studies, cost and other data, charts, testimony, exhibits and rate filings for use in and presentation before state agencies in Alabama, Georgia, Mississippi, North Carolina, and Tennessee in justification of collusively set intrastate rate proposals;

(f) Utilize SMCRC counsel and staff personnel to testify and prosecute collusively set intrastate rate proposals before state agencies;

(g) Utilize the collusively set intrastate rates in Alabama, Georgia, Mississippi, North Carolina and Tennessee and the interstate rates prevailing in the Southern Territory as rate comparisons to

justify collusively set intrastate rate filings before state agencies in each of said states;

(h) Act contemporaneously as members of intrastate rate committees in more than one state;

(i) Participate contemporaneously in more than one of the intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(j) Inform participants in any of the intrastate rates published and issued by SMCRC, MCTA and NCMCA of the rate activities pertaining to all of the states for which SMCRC, MCTA and NCMCA publish and issue intrastate rates;

(k) Carry out the foregoing to advance their mutual economic interests.

VII.

EFFECTS

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in intrastate commerce and the transportation of such commodities have been directly, unreasonably, arbitrarily and unlawfully burdened and restrained;

(b) interstate transactions and interstate commerce in general commodities have been directly and substantially affected in an arbitrary, unreasonable, unlawful and burdensome manner;

(c) rate competition among motor carriers in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee has been restrained and suppressed;

(d) rates charged by motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Missis-

sippi, North Carolina, and Tennessee have been raised, fixed, stabilized, and maintained at artificial and non-competitive levels;

(e) shippers patronizing motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee have been deprived of the benefits of free and open competition in the provision of said services;

(f) the consuming public, both nationally and in the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee, who purchase general commodity products have been deprived of the benefits of free and open competition in intrastate for-hire transportation of general commodities within said states.

PRAYER

WHEREFORE, the plaintiff prays:

1. That, pursuant to Section 5 of the Sherman Act, (15 U.S.C. § 5), the Court order summonses to be issued to those defendants not found within the State of Georgia, commanding them to appear and answer the allegations contained in the Complaint, and to abide by and perform such orders and decrees as this Court may make in the premises.

2. That the aforesaid combination and conspiracy among defendants be adjudged and decreed to be an unlawful restraint of trade and commerce in violation of Section 1 of the Sherman Act.

3. That each of the defendants named in this Complaint, its successors, assignees, and transferees, and their respective officers, directors, agents and employees thereof and all persons acting or claiming to act on behalf thereof, and all persons acting in concert therewith, be

permanently enjoined and restrained from continuing, maintaining or renewing, directly or indirectly, the combination and conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect.

4. That defendants SMCRC, MCTA and NCMCA be ordered to cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agencies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

5. That the defendants SMCRC, MCTA and NCMCA be ordered to cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, or statement of policy which have the purpose or effect of suppressing or restricting competition in violation of Section 1 of the Sherman Act by and between motor carriers engaged in for-hire transportation under certificates of authority issued by state regulatory agenices, and that each of these defendants promptly file with the Court and serve on plaintiff a report showing the steps the defendants have taken to comply with that order.

6. That each of the defendants, its successors, assignees, and transferees, and the respective officers, directors, agents and employees thereof, and all persons acting or claiming to act on behalf thereof, and all persons acting in concert therewith, be permanently enjoined and restrained from communicating directly or indirectly any

information concerning intrastate rates for competitor motor carriers, unless required by state statute, where the purpose or effect of such communication is to maintain or renew, directly or indirectly, the combination and conspiracy hereinbefore alleged, or any other combination or conspiracy having a similar purpose or effect.

7. That the plaintiff have such other and further relief as the Court may deem just and proper.

8. That the plaintiff recover the costs of this suit.

Donald I. Baker
DONALD I. BAKER
Assistant Attorney General

William E. Swope
WILLIAM E. SWOPE

Joseph J. Saunders
JOSEPH J. SAUNDERS
Attorneys,
Department of Justice

John W. Stokes, Jr.
JOHN W. STOKES, JR.
United States Attorney

Robert M. Silverman
ROBERT M. SILVERMAN

Robert N. Dempsey
ROBERT N. DEMPSEY

Judy L. Goldstein
JUDY L. GOLDSTEIN
Attorneys
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3278

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ANSWER OF NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

Filed January 17, 1977

[Caption Omitted in Printing]

NOW COMES DEFENDANT NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. (hereinafter "NCMCA"), and subject to its Motion to Dismiss the Complaint for Lack of Jurisdiction and its Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted, herewith answers the Complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction of this matter in that the controversy does not arise under the Constitution, laws or treaties of the United States nor any act of Congress regulating interstate commerce, and by separate Motion NCMCA is moving to dismiss the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim against NCMCA upon which relief can be granted, and by separate Motion NCMCA is moving to dismiss the Complaint.

THIRD DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct not actionable under the antitrust laws of the United States under the "state action" doctrine as developed in such cases as *Cantor* v. *Detroit Edison Co.*, 44 U.S.L.W. 5357 (July 6, 1976), *Goldfarb* v.

Virginia State Bar, 421 U.S. 773 (1975) and *Parker* v. *Brown*, 317 U.S. 341 (1943).

FOURTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct not actionable under the antitrust laws of the United States under the "Noerr-Pennington" doctrine. See *UMW* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

FIFTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct which is authorized by and protected under the First Amendment to the Constitution of the United States, and such alleged conduct is not actionable under the antitrust laws of the United States.

SIXTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct which is impliedly exempt from the antitrust laws of the United States under 49 U.S.C. § 5(b)(9) and 49 U.S.C. § 302(b), and by separate Motion NCMCA is moving to dismiss the Complaint.

SEVENTH DEFENSE

NCMCA answers the allegations of each numbered paragraph of the Complaint as follows:

1.

NCMCA admits that the Complaint seeks relief under Section 4 of the Sherman Act, but NCMCA denies that it has violated Section 1 of the Sherman Act.

2.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2.

3.

NCMCA admits that paragraph 3 contains certain definitions of terms used in the Complaint, which paragraph does not require an answer; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in said definitions.

4.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4.

5.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5.

6.

NCMCA admits that it is a corporation organized and existing under the laws of the State of North Carolina and that its principal offices are located in Raleigh, North Carolina; NCMCA denies that it "publishes and issues intrastate rates" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supple-

ments which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of remaining allegations in paragraph 6.

7.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7, but NCMCA denies that it has violated Section 1 of the Sherman Act.

8.

Answering paragraph 8, NCMCA admits that "truck transportation is an important transport mode in the movement of property in the United States;" NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 8.

9.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

10.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10.

11.

NCMCA admits the allegations in paragraph 11 as relate to motor carrier intrastate transportation.

12.

Answering paragraph 12, NCMCA admits the allegations contained therein with respect to the State of North Carolina; NCMCA is without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations in paragraph 12.

13.

Answering paragraph 13, NCMCA denies the allegations contained therein with respect to the State of North Carolina; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13.

14.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16.

Answering paragraph 16, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 16.

17.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18.

Answering paragraph 18, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 18.

19.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20.

Answering paragraph 20, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members

and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 20.

21.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22.

Answering paragraph 22, NCMCA denies that there are any intrastate rates "of . . . NCMCA," since intrastate rates for intrastate delivery of general commodities by motor carriers in North Carolina are set by the North Carolina Utilities Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 22.

23.

Answering paragraph 23, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23.

24.

NCMCA denies the allegations in paragraph 24.

25.

NCMCA denies the allegations in paragraph 25.

26.

NCMCA denies the allegations in paragraph 26.

27.

NCMCA denies the allegations in paragraph 27.

WHEREFORE, Defendant North Carolina Motor Carriers Association, Inc. prays the Court that the Complaint be dismissed as against it; that all relief sought by plaintiff be denied; that all other relief be denied; that judgment be entered in favor of North Carolina Motor Carriers Association, Inc.; and that this Defendant recover the costs of this action.

Charles L. Gowen
CHARLES L. GOWEN

Charles M. Shaffer, Jr.
CHARLES M. SHAFFER, JR.

Michael Eric Ross
MICHAEL ERIC ROSS
Counsel for North Carolina
Motor Carriers Association, Inc.

KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
404/572-4600

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANSWER

Filed January 17, 1977.

[Caption Omitted in Printing]

NOW COMES the Defendant Southern Motor Carriers Rate Conference (hereinafter SMCRC) and makes this its Answer to the Complaint as follows:

FIRST DEFENSE

In answer to the specific allegations of the numbered paragraphs of the Complaint, this Defendant shows the Court the following:

I

JURISDICTION AND VENUE

1.

In answer to Paragraph 1 of the Complaint, this Defendant admits that the Complaint is filed under Section 4 of the Sherman Act (15 U.S.C. § 4). This Defendant denies the remaining allegations contained in Paragraph 1 of the Complaint, and specifically denies any violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

2.

This Defendant admits the allegations contained in Paragraph 2 of the Complaint.

II

DEFINITIONS

3.

The allegations contained in Paragraph 3 of the Complaint are not factual allegations and require no response. For purposes of this Complaint and this Answer, this Defendant accepts the definitions contained in Paragraph 3 of the Complaint.

III

DEFENDANTS

4.

In answer to the allegations contained in Paragraph 4 of the Complaint, this Defendant denies that it "publishes and issues intrastate rates." Properly stated, this Defendant shows that it issues tariffs in which it publishes rates. In further answer, the remaining allegations contained in Paragraph 4 of the Complaint are admitted.

5.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 5 of the Complaint.

6.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 6 of the Complaint.

IV

CO-CONSPIRATORS

7.

This Defendant denies the allegations contained in Paragraph 7 of the Complaint and specifically denies any violations of the antitrust laws.

V

TRADE AND COMMERCE

8.

In answer to the allegations contained in Paragraph 8 of the Complaint, this Defendant admits that truck transportation is an important transport mode in the movement of property in the United States. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 8 of the Complaint.

9.

Using Plaintiff's definition of "for-hire transportation" as found in Paragraph 3(b) of the Complaint, this Defendant admits the allegations contained in Paragraph 9 of the Complaint.

10.

Using Plaintiff's definition of "for-hire transportation" as found in Paragraph 3(b) of the Complaint, this Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11.

The allegations contained in Paragraph 11 of the Complaint constitute a broad and general statement of a legal

conclusion which this Defendant, for want of information sufficient to form a belief as to the truth or falsity thereof, can neither admit nor deny. In further answer this Defendant shows that the statutes speak for themselves.

12.

Using Plaintiff's definitions of "for-hire transportation" and "general commodities" as found in Paragraph 3(b) and (a) of the Complaint respectively, this Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13.

The allegations contained in Paragraph 13 of the Complaint constitute a broad and general statement of a legal conclusion. The statutes, their interpretation, application and administration by the respective states and state agencies will have to speak for themselves. Accordingly, this Defendant denies the allegations of Paragraph 13 of the Complaint in the premises.

14.

In response to the allegations contained in Paragraph 14 of the Complaint, this Defendant admits that on or about January 10, 1956, it received ICC approval to operate as a rate making conference. The remaining allegations contained in Paragraph 14 of the Complaint are denied. In further answer, this Defendant shows that each member of SMCRC at his election may participate in the tariffs published by SMCRC to the extent that such tariffs apply to the territory in which said member has authority to operate in the transportation of general or specific commodities, as the case may be.

15.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither

admit nor deny the allegations contained in Paragraph 15 of the Complaint.

16.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 16.

17.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 17 of the Complaint.

18.

In response to the allegations contained in Paragraph 18 of the Complaint, this Defendant shows that to the extent that motor carriers which are parties to the tariffs published by SMCRC handle the traffic to which reference is made in the first sentence of Paragraph 18 of the Complaint, the intrastate rates named in those tariffs are charged. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 18 of the Complaint.

19.

In response to the allegations contained in Paragraph 19 of the Complaint and using Plaintiff's definitions of "for-hire transportation" and "general commodities" as found in Paragraph 3(b) and (a) of the Complaint respectively, this Defendant admits that shippers utilize intrastate "for-hire transportation" services of motor carriers within the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee to move "general commodities" from warehouses and distribution centers to cus-

tomers located in the same state as the warehouse or distribution center. This Defendant further admits that shippers also utilize said motor carriers for intrastate "for-hire transportation" of "general commodities," which the shippers manufacture or process within said states, to customers located in the same state as the manufacturing or processing facilities. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 19 of the Complaint.

20.

In response to the allegations contained in Paragraph 20 of the Complaint, this Defendant shows that to the extent that motor carriers which are parties to the tariffs published by SMCRC handle the traffic to which reference is made in the first sentence of Paragraph 20 of the Complaint, the intrastate rates named in those tariffs are charged. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 20 of the Complaint.

21.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 21 of the Complaint.

22.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 22 of the Complaint.

23.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny that many of these motor carriers, their system-wide operations—combined interstate and intrastate operations—are directly affected by their intrastate traffic. In further answer, this Defendant admits the remaining allegations contained in Paragraph 23 of the Complaint.

VI

VIOLATION ALLEGED

24.

This Defendant denies the allegations contained in Paragraph 24 of the Complaint.

25.

This Defendant denies the allegations contained in Paragraph 25 of the Complaint.

26.

In response to the introductory allegations contained in Paragraph 26, this Defendant denies participation in any combination or conspiracy and further denies that any of its activities have been in furtherance of an alleged combination or conspiracy in violation of the antitrust laws. In response to the allegations contained in sub-paragraphs 26(a) through (k) this Defendant makes the following answers with respect to this Defendant and this Defendant only:

(a) This Defendant admits the allegations contained in sub-paragraph 26(a) of the Complaint.

(b) This Defendant denies the allegations contained in sub-paragraph 26(b) as alleged, and in further answer

shows that the personnel and facilities of SMCRC are used for the purpose of initiating and proposing intrastate rates to the appropriate state regulatory agencies of the states herein involved.

(c) This Defendant denies the allegations contained in sub-paragraph 26(c) of the Complaint.

(d) This Defendant denies the allegations contained in sub-paragraph 26(d) as alleged, and in further answer shows that SMCRC in response to the affirmative direction of the North Carolina Public Utilities Commission has coordinated and continues to coordinate its activities together with those of the other Defendants in the initiation and proposal of intrastate rates to the North Carolina Public Utilities Commission.

(e) In response to the allegations contained in sub-paragraph 26(e) this Defendant admits it has engaged in the activities alleged for the purpose of justifying intrastate rate proposals, but specifically denies any "collusive" activity whatsoever.

(f) In response to the allegations contained in sub-paragraph 26(f) this Defendant admits it has engaged in the activities alleged for the purpose of testifying and prosecuting intrastate rate proposals before state agencies, but specifically denies any "collusive" activity whatsoever.

(g) In response to the allegations contained in sub-paragraph 26(g) this Defendant admits utilization of intrastate rates in effect in the respective states and utilization of the interstate rates prevailing in the Southern Territory as that term is defined in Paragraph 3(f) of the Complaint, as rate comparisons to justify intrastate rate filings before state agencies in each of the said states, but denies that it sets any intrastate rates and specifically denies any "collusive" activity whatsoever.

(h) This Defendant denies the allegations contained in sub-paragraph 26(h) of the Complaint.

(i) This Defendant denies the allegations contained in sub-paragraph 26(i) of the Complaint.

(j) In response to the allegations contained in sub-paragraph 26(j) this Defendant shows that it issues tariffs in which it publishes intrastate rates. In further answer, this Defendant shows that it informs participants in any of the intrastate rates published by it of the rate activities pertaining to all of the states for which it issues tariffs in which intrastate rates are published. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allega- the *[sic]* with respect to the activities of the Defendants MCTA and NCMCA. In further answer, this Defendant shows that the information it provides to participants in any of the intrastate rates published by it is part of its general bulletin in which it makes full public disclosure of all its activities. Said general bulletin is made available to participants, shippers, the Interstate Commerce Commission and all state public service commissions and public utility commissions in which it publishes rates, and all information contained therein is public knowledge available to the public in general.

(k) This Defendant, being a non-profit organization, denies the allegations contained in sub-paragraph 26(k) of the Complaint.

VII

EFFECTS

27.

This Defendant denies the allegations contained in Paragraph 27 of the Complaint and sub-paragraph (a) through (f) thereunder.

28.

All allegations of the Complaint not hereinbefore specifically answered are denied.

SECOND DEFENSE

"FAILURE TO STATE A CLAIM"

29.

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

THIRD DEFENSE

"LACK OF SUBJECT MATTER JURISDICTION"

30.

The exercise of regulation of the activities alleged in the Complaint to be in violation of the Federal antitrust laws are solely within the jurisdiction of the several states and therefore, beyond the jurisdiction of the Federal courts.

FOURTH DEFENSE

"IMPLIED REPEAL"

31.

The activities alleged in the Complaint to be violative of the antitrust laws are subject to a special regulatory scheme and because of the clear repugnancy between that regulatory scheme and the antitrust laws, the latter are impliedly repealed.

FIFTH DEFENSE

PARKER* v. *BROWN

32.

The activities alleged in the Complaint to be violative of the antitrust laws are exempt therefrom under the doctrine of *Parker* v. *Brown*.

SIXTH DEFENSE

"NOERR-PENNINGTON"

33.

The activities alleged in the Complaint to be violative of the antitrust laws are exempt therefrom by reason of the Noerr-Pennington doctrine.

SEVENTH DEFENSE

"SECTION 5a IMMUNITY"

34.

All activities engaged in by this Defendant in the collective initiation and proposal of intrastate rates conforms in all particulars to the procedures followed in similar activities by this Defendant by which interstate rates are initiated and proposed to the Interstate Commerce Commission, and as such are exempt from the proscriptions of the antitrust laws by virtue of Section 5a of the Interstate Commerce Act (49 U.S.C. Section 5b).

EIGHTH DEFENSE

"UNFAIRNESS"

35.

The participation by the states in the regulation of the activities alleged in the Complaint to be violative of the antitrust laws is so dominant and pervasive that it would

be unfair to hold this Defendant responsible for its conduct implementing said activities.

NINTH DEFENSE

"PRIMARY JURISDICTION"

36.

All matters raised by the allegations of the Complaint are within the primary jurisdiction of the respective federal or state regulatory agencies charged with the exclusive right and duty to regulate such matters.

TENTH DEFENSE

"EXHAUSTION OF ADMINISTRATIVE REMEDIES"

37.

The Plaintiff has failed to exhaust the administrative remedies made available by the respective state regulatory agencies charged with the exclusive power and duty to regulate the matters alleged in the Complaint.

ELEVENTH DEFENSE

"UNCLEAN HANDS"

38.

The Plaintiff comes into Court with unclean hands by virtue of the fact that the activities alleged therein to be violative of the antitrust laws have been conducted by the Defendant with the encouragement and approval of the Plaintiff through the Congress and the administrative agencies thereof for more than thirty (30) years.

WHEREFORE, the Defendant Southern Motor Carriers Rate Conference, Inc., respectfully prays the Court as follows:

(a) that the Complaint be dismissed with prejudice; or

(b) the case by stayed pending the remand of the matters herein to the appropriate federal or state agency under the doctrine of Primary Jurisdiction;

(c) the case be stayed pending the Plaintiff's proper exhaustion of its administrative remedies; and

(d) the cost of the suit be cast upon the Plaintiff; and

(e) such further relief as may be meet and proper in the premises.

Attorneys for Defendant
Southern Motor Carriers Rate
Conference, Inc.

OF COUNSEL:
Arnall, Golden & Gregory
1000 Fulton Federal Bldg.
Atlanta, Georgia 30303
(404) 577-5100

Ellis Arnall
ELLIS ARNALL

Allen I. Hirsch
ALLEN I. HIRSCH

William H. Kitchens
WILLIAM H. KITCHENS

Timothy R. Askew
TIMOTHY R. ASKEW

Rice, Carpenter & Carraway
608 Perpetual Building
1111 E Street, N.W.
Washington, D.C. 20004
(202) 737-7173

Homer S. Carpenter
HOMER S. CARPENTER

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STIPULATION

Filed March 8, 1977.

[Caption Omitted in Printing]

IT IS HEREBY STIPULATED AND AGREED by and between counsel for Plaintiff and counsel for Defendants, subject to the approval of the Court, to correct the Complaint in the above captioned case in order to correct a previously undetected typographical error.

The Complaint, through an inadvertent error, refers in paragraph 27(a) to "intrastate" commerce. This should refer to "the flow of general commodities in *interstate* commerce." Therefore, paragraph 27(a) as corrected should read as follows:

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in interstate commerce and the transportation of such commodities have been directly, unreasonably, arbitrarily and unlawfully burdened and restrained;

Each of the Defendants having denied paragraph 27 of the original Complaint, it is hereby stipulated and agreed between counsel for Plaintiff and counsel for each of the Defendants that the Answer of each of the Defendants to paragraph 27 shall continue to stand; that the Answer of each of the Defendants to the new paragraph 27 is properly and timely filed; and that no further response by the Defendants is necessary.

A corrected page 11 of the Complaint is attached to this stipulation.

Dated: March 8, 1977

For Plaintiff:

Robert M. Silverman
ROBERT M. SILVERMAN
Attorney for Plaintiff
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530
Telephone: (202) 739-3278

For Defendants:

Timothy R. Askew
TIMOTHY R. ASKEW
Attorney for Southern Motor Carriers Rate Conference, Inc.
Arnall, Golden & Gregory
1000 Fulton Federal Building
Atlanta, Georgia 30303

J. Raymond Clark
J. RAYMOND CLARK
Attorney for Motor Carriers Traffic Association, Inc.
Suite 1150
6000 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Charles M. Shaffer, Jr.
CHARLES M. SHAFFER, JR.
King & Spalding
Attorney for North Carolina Motor Carriers Association, Inc.
2500 Trust Company Tower
Atlanta, Georgia 30303
Telephone: (404) 572-4600

SO ORDERED

This ____ day of January, 1977

_____

UNITED STATES DISTRICT JUDGE

[ATTACHMENT TO STIPULATION]

(i) Participate contemporaneously in more than one of the intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(j) Inform participants in any of the intrastate rates published and issued by SMCRC, MCTA and NCMCA of the rate activities pertaining to all of the states for which SMCRC, MCTA and NCMCA publish and issue intrastate rates;

(k) Carry out the foregoing to advance their mutual economic interests.

VII.

EFFECTS

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in interstate commerce and transportation of such commodites have been directly, unreasonably, arbitrarily and unlawfuly burdened and restrained;

(b) interstate transactions and interstate commerce in general commodities have been directly and substantially affected in an arbitrary, unreasonable, unlawful and burdensome manner;

(c) rate competition among motor carriers in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee has been restrained and suppressed;

(d) rates charged by motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee have been raised, fixed, stabilized, and maintained at

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

STIPULATION

Filed May 8, 1978

[Caption Omitted in Printing]

It is hereby stipulated by and between the Complainant (Government), on the one hand, and the Defendants Southern Motor Carriers Rate Conference, Inc. (SMCRC), Motor Carriers Traffic Association, Inc. (MCTA) and North Carolina Motor Carriers Association (NCMCA), on the other other, as follows:

1.

No portion of this Stipulation shall be interpreted as constituting an admission by Defendants, or any of them, that any violation of the Sherman Act has occurred; and no portion shall be interpreted as a concession by the Government that no such violation has occurred.

2.

This Stipulation shall bind the parties hereto only in connection with this action, and shall not pertain to nor be controlling in connection with any other judicial or administrative proceeding of any kind whatsoever.

3.

The transportation services furnished by motor common carriers to the public at large are very important to the commerce of the United States. To the extent that those motor common carrier services are provided for the transportation of general commodities in movements across State lines, they are subject to regulation by the Interstate Commerce Commission. To the extent that

those motor common carrier services are performed in the transportation of shipments in intrastate commerce within an individual State, they are subject to regulation by that State.

4.

There is a substantial movement of general commodities by motor common carrier in intrastate commerce within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. The movements themselves as well as the rates and charges assessed for the transportation of articles in such movements have a "direct and substantial effect on interstate commerce," within the meaning of the Sherman Act.

5.

Some shippers engage in private transportation of their own shipments of general commodities from points outside to points within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, and there tender such shipments to motor common carriers for further transportation to consignees within the same State as the point of tender, which consignees have been predesignated prior to the commencement of the private transportation. For intrastate deliveries of these general commodities, intrastate motor common carriers charge the interstate rates applicable thereto.

6.

The procedures and practices of the carrier rate committees of the Defendants MCTA and NCMCA with respect to the initiation and proposal of new and amended rates to the North Carolina Public Service Commission, the governmental agency charged by law with the responsibility to regulate rates within North Carolina, for application to intrastate commerce in the State of North

Carolina and the procedures and practices of the carrier rate committees of the Defendant SMCRC with respect to the initiation and proposal of new and amended rates to the respective governmental agencies charged by law with the responsibility to regulate rates in the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee for application to intrastate commerce in said States are to all intents and purposes similar or identical to those followed by the carrier rate committees of the Defendants SMCRC and MCTA with respect to the initiation and proposal of new and amended rates to the Interstate Commerce Commission for application to interstate commerce, which are exempt from the antitrust laws pursuant to Section 5a(9) of the Interstate Commerce Act, 49 U.S.C § 5b(9) (1975).

7.

The Government does not contend in this case that any of the Defendant Conferences or any of the intrastate rate committees of the respective Defendant Conferences have done anything to interfere in any way with the right of independent action of any individual carrier.

SO STIPULATED this 4th day of May, 1978.

For the United States of America
Robert Silverman
ROBERT M. SILVERMAN

Judy L. Goldstein
JUDY L. GOLDSTEIN

Attorneys, Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3278

For Defendant Southern Motor
Carriers Rate Conference, Inc.

Allen I. Hirsch
ALLEN I. HIRSCH

Arnall, Golden & Gregory
1000 Fulton Federal Building
Atlanta, Georgia 30303
Telephone: (404) 577-5100

Homer S. Carpenter
HOMER S. CARPENTER
Rice, Carpenter and Carraway
Suite 1301
1600 Wilson Boulevard
Arlington, Virginia 22209
Telephone: (703) 522-0900

For Defendant North Carolina Motor
Carriers Association, Inc.

Charles L. Gowen
CHARLES L. GOWEN

Charles M. Shaffer, Jr.
CHARLES M. SHAFFER, JR.

King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303
Telephone: (404) 572-5785

For Defendant Motor Carriers
Traffic Association, Inc.

J. Raymond Clark
J. RAYMOND CLARK

1150 Watergate 600 Building
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Telephone: (202) 337-6161

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C76-1909A

UNITED STATES OF AMERICA

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, *et al.*

ORDER

Filed May 10, 1978.

The Government brings this action pursuant to § 4 of the Sherman Act, 15 U.S.C. § 4, seeking to enjoin and restrain alleged continuing violations by the defendants of § 1 of the Sherman Act, 15 U.S.C. § 1. The Government contends that the three rate conference defendants and other unnamed co-conspirators have engaged in a continuing conspiracy to fix rates for intrastate for-hire transportation of commodities in Alabama, Georgia, Mississippi, North Carolina, and Tennessee. The five states have each accepted the court's invitation to appear as amicus curiae. *United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 52 (N.D. Ga. 1977). Presently before the court is the motion of the National Association of Regulatory Utility Commissioners [hereinafter "NARUC"] to intervene as a party defendant in the action. Plaintiff alone, opposes NARUC's proposed intervention. Before proceeding to the merits of the motion *sub judice*, an introduction of NARUC as an organization and a presentation of movant's and plaintiff's arguments are warranted.

NARUC is a quasi-governmental, nonprofit organization of commissions, boards, and agencies of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands, which are charged with regulation of motor carriers within each respective state or territory. NARUC is recognized in various federal statutes as "the national organization of State commissions. . . ." Interstate Commerce Act, 49 U.S.C. § 305(f); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1673(a)(1); and Federal Communications Act, 47 U.S.C. § 410(c). The organization's official functions include such tasks as presentation of standard forms and procedures for interstate motor carriers for adoption by the Interstate Commerce Commission. 49 U.S.C. § 302(b)(2). Various courts have recognized NARUC's special stature as an organization and have allowed NARUC's intervention in a representative capacity. *E.g.*, *Washington Utilities and Transportation Commission* v. *F.C.C.*, 513 F.2d 1142, 1154 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976); *National Association Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689 (D.C. Cir. 1971); *Lynch* v. *Public Service Commission of Nevada*, 376 F. Supp. 1033 (D. Nev. 1974); *Tenneco Inc.* v. *Public Service Commission of West Virginia*, 352 F. Supp. 719 (S.D. W. Va. 1973), *aff'd*, 489 F.2d 334 (4th Cir.), *cert. denied*, 417 U.S. 946 (1974).

NARUC herein seeks to intervene as a party defendant to present and to defend the rate-setting practices of its five affected state commission members. Plaintiff objects to NARUC's intervention contending: (1) that the association lacks standing on its own or as a representative of the commissions; (2) that NARUC fails to meet the Rule 24(a) requirements for intervention as of right or the Rule 24(b) parameters for permissive intervention; and (3) that NARUC's motion is ultimely and intervention will unduly prejudice the present parties.

Intervention as of right is either: expressly authorized by statute, Rule 24(a)(1); or impliedly available under certain conditions, Rule 24(a)(2). There is no claimed statutory authorization in this instance and NARUC therefore must demonstrate under Rule 24(a)(2): (1) that is holds an interest in the subject matter of the litigation; (2) that its protection of such interest will be impaired or impeded by the outcome of the litigation; and (3) that its interest is inadequately represented by the present parties. *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970), *cert. denied*, 400 U.S. 878 (1971). An underlying prerequisite demands that NARUC show that its application to intervene is tendered in a timely manner to minimize the prejudice of delay to the existing parties. Plaintiffs contend that NARUC must also demonstrate its standing to invervene as a defendant. *Arvida Corp.* v. *City of Boca Raton*, 59 F.R.D. 316, 321 (S.D. Fla. 1973). The court finds that the standing requirements of proof of an "injury in fact," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), within the qualifying "zone of interests." *Association of Data Processing Service Organizations, Inc.* v. *Camp*,.397 U.S. 150, 151 (1970), are subsumed within the Rule 24(a)(2) prerequisites.

The court in determining the propriety of intervention must measure the facts and circumstances presented by each of the recognized prerequisites. *United States* v. *Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978). Intervention as of right first requires a "direct, substantial, legally protectable interest in the proceedings." *Diaz* v. *Southern Drilling Corp.*, *supra*, at 1124. *See* B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 400 (1967). NARUC purports to represent the interests of the five regulatory commissions involved in the challenged ratemaking

collectives. NARUC establishes its representative capacity by reference to the statutory authorization "as the national organization of State commissions . . ." and judicial recognition introduced hereinabove. The organization has been specifically empowered by its southeastern state members to participate on their behalf in this litigation. Resolution of the Southeastern Association of Regulatory Utility Commissioners, reported in NARUC No. 22-1977, May 30, 1977, at 17-18.

The organization may then have the concrete interest or standing as a representative of the five threatened commissions, if in fact the five could have been named as defendants in the first instance. *See Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). The five state commissions clearly could have been named parties. The injury threatened is an alleged dismantling of their entire rate-making structure. A denial of plaintiff's sought remedy will directly affect these five commissions. *See id.* at 515. The court therefore finds that the association, NARUC, has standing to represent the interests of the five members commissions.

NARUC's representation of its five members' interests meets the first two prerequisites for intervention. The interests to be represented are real and substantial, not hypothetical, generalized, or merely contingent. *Compare Cohn* v. *Equal Employment Opportunity Commission*, 569 F.2d 909, 911 (5th Cir. 1978) *with United States* v. *936.71 Acres of Land*, 418 F.2d 551 (5th Cir. 1969) *and Arivda Corp.* v. *City of Boca Raton*, *supra* at 321. Whether these five commissions will be able to continue in their present rate-making routines is an essential question posed in this litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. The answer will not be one of general

policy preference but of immediate legality of the conference system. NARUC's proposed representation of the interests of these five commissions thus satisfies the real interest and potential harm prerequisites of intervention, Rule 24(a)(2).

Plaintiff raises the attempted intervention of the National Association of Women [hereinafter "NOW"] in *United States* v. *Alleghany-Ludlum Industries, Inc.*, 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), in its opposition to NARUC's intervention for want of an adequate and protectable interest in the action. The *Alleghany-Ludlum* decision, however, is not controlling upon the facts and circumstances presented herein. NARUC's proposed intervention is argued under Rule 24(a)(2), nonexpress intervention, while NOW's primary arguments were for intervention under statutory authority, Rule 24(a)(1). *Id.* at 840-45. Upon a secondary argument, NOW was also denied intervention under Rule 24(a)(2) when the court found: (1) that NOW would not be bound by the disputed consent decrees; (2) that NOW's plenary legal remedies remained; and (3) that NOW's possible future intervention was not precluded. The court's findings in *Alleghany-Ludlum* clearly distinguish NOW's proposed Rule 24(a)(2) intervention from the case at hand, as: (1) the represented members' interests in collective rate-making will be decided by the outcome of this action; (2) the commissions' conference form of rate-making will be ettled law in this district, *c.f.*, *In re Penn Central Commercial Paper Litigation*, 62 F.R.D. 341, 346-47 (S.C. N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975) [controlling effect is limited to the district of decision]; and (3) the court does not now intend to reopen the intervention issue at a later stage in this proceeding. *Alleghany-Ludlum* therefore does not provide the guidance here that plaintiff would assign it.

The third intervention prerequisite of a showing of inadequate representation by the present litigants has also been satisfied by NARUC. Possible areas of inadequacy have been identified by the courts as: (1) collusion between the present representative and an adversary; (2) adverse interests of the representative and the intervenor; and (3) failure of the representative to serve its duty of representation. *Martin* v. *Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969). NARUC in no way disparages the abilities or motives of the named defendants and their counsel but instead notices that the commissions and the present defendants' interests may well be adverse in portions of the possible proof. *See United States* v. *Southern Motor Carriers Rate Conference*, *supra* at 47 [if plaintiff can "demonstrate that defendants' efforts were a mere 'sham' whereby defendants usurped the powers of the state regulatory agency. . ."] Plaintiff's contention that the states as amicus curiae will fully serve the individual commissions' interests is not persuasive. The special status of the states as amicus curiae, a status which they have vigorously fulfilled, does not carry the panoply of rights of participation as a party. For example, the states will be unable to appeal a decision which they regard as adverse. Further, the five affected states themselves have recorded no opposition to NARUC's intervention on their respective commissions' behalf. The third prerequisite, that the commissions' interests are now inadequately represented, is thus satisfied.

The final consideration, that NARUC's motion for intervention be tendered in a timely fashion, has also been met. The parties should suffer little prejudice as NARUC considers and enters into any of the already agreed upon stipulations. The court expects no untoward delay of the litigation by NARUC's intevention at this juncture in the proceedings.

Upon all of the foregoing, therefore, NARUC's motion to intervene as of right as a defendant should be GRANTED. Plaintiff has voiced apprenhension that NARUC will use intervention to lobby for all member commissions. NARUC's entry into this litigation is as a defendant, not as a lobbyist. The controversy before the court concerns three rate-making conferences and five affected states. The action, already complex, will not be extended to other conferences or other states' commissions. NARUC's intervention is permitted only to the extent that NARUC purports to represent the five affected states' commissions. This permission does not preclude reference to general patterns or practice but merely reaffirms the original scope of this action.

Accordingly, NARUC's motion to intervene as a party defendant to represent the five state commissions is hereby GRANTED.

IT IS SO ORDERED.

This, the ____ day of May, 1978.

Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT NCMCA

EXHIBIT "B"

Filed July 31, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF J. C. TURNER

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Personally before me, the undersigned officer, duly authorized to administer oaths appeared Mr. J. C. Turner, who, being duly sworn, stated on oath of his personal knowlege as follows:

1.

My name is J. C. Turner, and I am a resident of Wake County, North Carolina. I am more than twenty-one years of age, and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use in support of the Motion for Summary Judgment of Defendant North Carolina Motor Carriers Association, Inc. (hereinafter "NCMCA") or for any other purpose in this litigation.

2.

At the present time, I am Coordinator, Accounting Traffic Section, North Carolina Utilities Commission, PUBLIC STAFF, (hereinafter "Public Staff"). My responsibilities include the analysis of all rate increase proposals for motor common carriers which are submitted to

the North Carolina Utilities Commission (hereinafter "Commission") by the three rate bureaus operating in North Carolina: NCMCA, Southern Motor Carriers Rate Conference (hereinafter "SMCRC"), and Motor Carriers Traffic Association, Inc. (hereinafter "MCTA"). I have had exactly these same responsibilities since July 1, 1971, and I have been involved in the establishment of motor common carrier intrastate rates in North Carolina since July 1, 1971.

3.

The Public Staff, which is supervised by an Executive Director who is appointed by the Governor and confirmed by the General Assembly, represents the using and consuming public in the establishment of public utility rates, including motor common carrier rates, in North Carolina. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. Presently, eighteen (18) members of the Public Staff are directly involved in motor common carrier rates, including the Executive Director, eight rate specialists, three accountants, and six lawyers. These eighteen (18) members are assisted by a clerical staff, and they have access as needed to economists working for the Public Staff. When motor common carrier rate proposals are made by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

4.

On April 26, 1977, the General Assembly passed a bill expressly authorizing collective rate-proposing in North Carolina. Pursuant to this bill, the Commission on October 10, 1977, established a procedure for a rate bureau such as NCMCA to obtain approval of its collective rate-proposing in North Carolina. On April 26, 1978, NCMCA

submitted its application to the Commission for approval as a rate conference. The Public Staff reviewed NCMCA's application and has recommended its approval by the Commission.

5.

When an application for a general commodity general rate increase is filed, which would apply across-the-board to all general commodities, the Commission sets the matter down for an investigation and hearing and suspends the proposed rate increase. To my knowledge the only time a hearing has not been held occurred during the 1974 Arab Oil Embargo when an emergency fuel surcharge was allowed on an interim basis. Proposals which are not general rate increase proposals are carefully investigated by the Public Staff prior to its recommendation to the Commission. In those cases where the Public Staff finds in its investigation that conditions surrounding the proposed rate increases are questionable and may be unreasonable or unjustified, it recommends a suspension of the proposed increase and a hearing.

6.

Once a hearing has been set, the Public Staff performs an even more intensive investigation and analysis as to the necessity and cost-justification for the proposed increases. For all rate increase proceedings, the Public Staff requires carriers and their agents to furnish freight bills, financial statements, traffic studies and data processing records for its use in preparing evidence and statements to present at the hearings. Also, on-sight [sic] review and verification of motor carrier books and records are performed by the Public Staff to gather evidence to be used in such rate proceedings. The Public Staff through its investigation verifies the carrier's operating ratios as they are presented by the carriers through their agents, and/or independently determines carrier operat-

ing ratios. For example, when the last request for a motor carrier general rate increase was made, the Public Staff analyzed and audited the SMCRC continuing traffic study freight bill data, carrier annual report data, carrier books and records, and the SMCRC automated traffic costing procedures in order to determine whether the proposed rate increases were necessary. The Public Staff also developed evidence as to the revenues earned by the carriers and the operating ratios experienced by representative carriers.

7.

After its thorough investigation, the Public Staff through sworn testimony presented at the hearing makes recommendations as to the proposed increases. For example, in the last request for a general rate increase by motor carriers, the Public Staff recommended that increases in rates and charges as proposed by the carrier agents be revised and placed on shipment weight groups in a manner quite dissimilar from that proposed by the rate bureaus. For the most part, the Public Staff recommendation was adopted by the Commission.

8.

On occasion, the three rate bureaus may jointly submit at the hearing a rate justification statement prepared for them by SMCRC; however, this rate justification statement has never been controlling on the Commission. During the last seven years, the SMCRC rate justification statement has seldom been accepted in its entirety in connection with a proposed general rate increase. No material portion of this rate justification statement will be recommended as acceptable until such time as the Public Staff has fully investigated the statement and verified its contents.

9.

I have closely observed and participated in the setting of motor common carrier rates in North Carolina and for the past seven years, and I am thoroughly familiar with the manner in which proposals are submitted to the Commission and the manner in which the Commission sets the rates. In my opinion, collective rate-proposing in North Carolina greatly assists the Public Staff in fulfilling its duty and responsibility to adequately protect the using and consuming public in North Carolina. If collective rate-proposing on behalf of the three rate bureas in North Carolina were enjoined by this Court, in my opinion it would have severe and negative consequences on the effective regulation of the motor carrier industry in North Carolina.

J. C. Turner
J. C. TURNER

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT NCMCA

EXHIBIT "C"

Filed July 31, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF I. H. HINTON

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Personally before me, the undersigned officer, duly authorized to administer oaths appeared Mr. I. H. Hinton, who, being duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is I. H. Hinton, and I am a resident of Spring Hope, Nash County, North Carolina. I am more than twenty-one years of age, and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use in support of the Motion for Summary Judgment of Defendant North Carolina Motor Carriers Association, Inc. (hereinafter "NCMCA") or for any other purpose in this litigation.

2.

At the present time, I am Director, Transportation Division of the North Carolina Utilities Commission (hereinafter "Commission"). My responsibilities include the review of general rate increase proposals for motor common carriers which are submitted by the three rate

bureaus in North Carolina: NCMCA, Southern Motor Carriers Rate Conference (hereinafter "SMCRC"), and Motor Carriers Traffic Association, Inc. (hereinafter "MCTA"). I have had these responsibilities since 1958, and I have been involved in the establishment of motor common carrier intrastate rates in North Carolina since 1949.

3.

The Commission has been accepting and acting upon collective rate proposals by the three rate bureaus since 1943. In 1949, the Commission requested that the three rate bureaus submit their proposals with the same effective date. Rule 4-4(b) of the Commission, which has been in effect since 1945, provides that applications for permission to change or establish rates on less than statutory notice must be made "by the carrier or the agent holding authority to file the proposed publication." Since 1947, legislation in North Carolina (now Code Section 62-270 of the Public Utilities Act of North Carolina (hereinafter "Act")), has provided that service of orders and notices may be made upon the carrier involved or "agent who has filed a tariff or schedule in behalf of such carriers." Pursuant to this legislation, the Commission has since 1947 been routinely sending orders and notices to the three rate bureaus on behalf of their member carriers. From 1947 until the present time, approximately ninety (90%) percent of the general commodity motor carrier rate proposals to the Commission have been made by the three rate bureaus on behalf of their member carriers.

4.

On April 26, 1977, the General Assembly passed a bill expressly authorizing collective rate-proposing in North Carolina. A certified copy of this bill is attached hereto and made a part hereof as Exhibit 1. Pursuant to this bill,

the Commission on October 10, 1977 established a procedure for a rate bureau such as NCMCA to obtain approval of its collective rate-proposing in North Carolina. A certified copy of the Commission Order of October 10, 1977, is attached hereto and made a part hereof as Exhibit 2. On April 26, 1978, NCMCA submitted its application to the Commission for approval as a rate conference, and the Commission approved NCMCA's application on July 24, 1978. A certified copy of the Commission Order approving NCMCA's application is attached hereto and made a part hereof as Exhibit 3.

5.

Since 1945 the Commission has been establishing motor carrier rates in North Carolina. At the present time, the Commission has an annual budget of $3,400,000.00 to carry out the regulation of public utilities including motor carriers in North Carolina. The Commission now has a staff of seventy-five (75) employees, including attorneys, accountants, engineers, and rate specialists who assist in setting rates, including the undersigned in my capacity as Director of Transportation Division of the Commission. The Commission also includes a separate Public Staff of eighty-five (85) employees who are independent of the Commission. This Public Staff, which is supervised by an Executive Director who is appointed by the Governor and confirmed by the General Assembly, represents the using and consuming public in the establishment of public utility rates including motor common carrier rates in North Carolina. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. Presently, eighteen (18) members of the Public Staff are directly involved in motor common carrier rates, including the Executive Director, eight rate specialists, three accountants, and six lawyers. These eighteen (18) members are assisted by a clerical staff, and they have access

as needed to economists working for the Public Staff. When motor common carrier rate proposals are made by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

6.

When any motor carrier rate proposal is made by the three bureaus, it is submitted to the Chief Clerk of the Commission, and a copy is distributed to the undersigned on behalf of the Commission and to the Public Staff. A general rate increase proposal is one that would apply across-the-board to all general commodities; and if the proposal involves a general rate increase, a copy of the proposal is also distributed promptly to each of the seven (7) Commissioners on the Commission. After the proposal has been filed, the Public Staff thoroughly analyzes and reviews the proposal on behalf of the consumers and users in North Carolina. If the Public Staff deems it necessary, it will request that the Commission set the matter down for a hearing, which suspends the effective date of the rate proposal. With the exception of an emergency fuel surcharge allowed on an interim basis to motor carriers during the 1974 Arab Oil Embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission.

7.

When the Public Staff requests a hearing on a rate proposal, the Commission will set the matter down for a hearing and distribute notice of the hearing date to all interested parties and to the press. The procedure at the hearing is the same whether the proceeding involves a general rate increase proposal or other rate proposals and tariff adjustments. When a general rate increase proposal

is involved, this matter is either heard by the Commission en banc or by a panel of three (3) Commissioners. The hearing is open to the public and evidence may be submitted by any interested party including the applicant, any protestant, any intervenor and the Public Staff on behalf of the consumers and users. The Attorney General of North Carolina has a separate utility division which also actively participates in general rate cases in North Carolina, including those affecting motor carrier rates.

8.

Where a general rate increase proposal is involved, the three rate bureaus may submit to the Commission at the hearing a rate justification statement in support of the proposal, and this statement may contain information about rates in other states. However, this statement and the rates in the other states are not controlling on the Commission as to its decision, and the facts in the statement are verified by the Public Staff before they are given any probative value at the hearing.

9.

The Commission does not "rubber stamp" rate increase proposals or any other proposal. For example, in December, 1969, the three rate bureaus on behalf of their members sought a general rate increase of approximately 75% which would equalize North Carolina intrastate motor carrier rates with the interstate motor carrier rates. After hearing before the Commission, this rate proposal was denied and the Commission authorized the rate increase not to exceed 15%. The active role of the Commission in setting rates is also revealed in the general rate increase proposed by the three rate bureaus in 1971, when they sought a rate increase ranging from 3% on truckload shipments to 30% on less-than-truckload shipments. After a hearing before the Commission, the Com-

mission entered an order denying the rate increase proposal in its entirety. The motor carriers appealed this decision to the Court of Appeals of North Carolina, which affirmed the denial of any rate increase in the case of *State of North Carolina, Ex. Rel. Utilities Commission, et al* v. *Motor Carrier Traffic Association, Inc., Agent, et al*, 16 N. C. App. 515, 192 SE2nd 580 (1972). A third example of the significant role of the Commission in setting rates took place in 1975. The motor carriers on May 3, 1975, sought an immediate rate increase of up to 19%. After a full investigation by the Commission (now Public Staff) and a hearing before the Commission, the Commission allowed the rate increase up to 19% but not until February 1, 1976, nine months after the proposal was made.

10.

I am thoroughly familiar with the manner in which proposals are submitted to the Commission and the manner in which the Commission sets the rates. To my knowledge, there has never been a general rate increase proposal on general commodities by motor carriers in North Carolina that has not been suspended by the Commission and thoroughly investigated by the Commission (now Public Staff); and, with the exception of the emergency fuel surcharge allowed on an interim basis to the motor carriers during the 1974 Arab Oil embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission.

11.

There are approximately six hundred (600) motor common carriers in North Carolina, and intrastate motor carrier rates in North Carolina are approximately 25% below interstate motor common carrier rates. I have closely observed the setting of motor carrier rates in North Carolina for the past twenty (20) years. If collec-

tive rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the Regulation of the motor carrier industry in North Carolina. All carriers would be put to the added expense of preparing and filing individual rate proposals and maintaining individual tariffs, which added expense would be reflected in higher rates to the shippers. While large carriers might be able to absorb these increased administrative expenses, they would have a severe adverse effect on small carriers. Furthermore, small carriers would run the risk of domination by larger carriers who could transport products on a volume basis. Shippers would also be put to the increased administrative expense of maintaining additional personnel to analyze the numerous rate proosals brought about by individual tariff filings and to contest proposals before the Commission. Finally, the staff and budget of both the Public Staff and the Commission would have to be greatly increased in order to properly handle the greatly increased individual rate proposals and tariff filings.

I. H. Hinton
I. H. HINTON

[Jurat and Exhibits Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

***AMICUS CURIAE* BRIEF [OF NMFTA] IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

ATTACHMENT I

Filed August 8, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF JAMES C. HARKINS

INTRODUCTION

My name is James C. Harkins and I am the Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA). I have been working in transportation for over 20 years, always in a capacity having to do with the matter of rates and ratemaking. My experience covers three years of work with the railroad industry; 10 years with a manufacturing and shipping company; and 10 years with the regulated motor carrier industry. Since 1957 I have been directly involved in the matter of ratemaking and rate negotiation on both sides of the table: as a representative of a shipper and as a representative of regulated motor carriers. For over 20 years I have been involved in the negotiation of motor carrier rates and have a thorough knowledge of the system of collective ratemaking.

From the point of view of the shipper, collective ratemaking enables effective negotiation of rates while providing assurance that other shippers, including their competitors, are not gaining an unfair advantage. From the view of the carrier, collective ratemaking permits negotiation with shippers; promotes through service be-

tween all of the points in the United States at a rate level that is competitive with all other regulated common carrier service; and enables a carrier to meet their service obligations as dictated by law. The advantages of collective ratemaking are equally manifest on the intrastate level and the interstate level. Below, I will detail the workings of a part of the ratemaking process—the setting of commodity classifications—and will describe how the transportation system and the public benefit from the collective action of carriers in establishing a uniform classification.

The NMFTA is an association which has a membership of almost 3,000 motor common carriers and serves these carriers (and 2,000 others including railroads, freight forwarders and water carriers) in an important function of pricing—a function called commodity classification.

I. The Nature Of Classification

But what is a commodity classification? Simply, it is the grouping of all commodities hauled by motor common carriers which, because of their similar transportation characteristics, merit similar transportation rates. See *Director General* v. *Viscose Co.*, 254 U.S. 498 (1921). The grouping of commodities injects into the ratemaking system a vehicle for providing equitable treatment for the hundreds of thousands of products moving in commerce. As the ICC said in *Classification of Canned Goods*, 98 I.C.C. 166, 176 (1925): "Classification is largely a matter of comparison of all commodities that move as freight and the assignment of ratings such that each shall bear its fair share of the transportation burden." The benefits of so apportioning transportation costs so that "each shall bear its fair share of the transportation burden" were recognized in the earliest days of transportation regulation:

> "It was, therefore, seen not be be unjust to apportion the whole cost of service among all the articles trans-

> ported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received. Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it." (ICC First Annual Report to Congress, p. 31).

Classification is also a means for injecting simplicity into what would otherwise be a nightmarish rate structure. There are in excess of 117,000 points in the United States served by almost 15,000 regulated motor common carriers which haul over 15,000 separate articles of commerce. To establish individual rates for every product moving between any two of these places would create an astronomical number of rates. As described below, classification makes the system workable.

The Classification published by NMFTA, known as the National Motor Freight Classification (NMFC), divides all commodities into 23 possible categories, or ratings. Each of these ratings is a numeric factor which is reflective of approximate percentages of bureau published rates for Class 100 (known as First Class)—e.g., Class 70, Class 125. For each article moving in commerce, the Classification lists a truckload (TL) rating, a less-than-truckload (LTL) rating, and a minimum weight. See sample page attached hereto as Appendix A. The minimum weight is established in combination with the truckload rating. It states the minimum quantity of a particular commodity which must be tendered to the carrier to entitle the shipper to the generally lower TL classification rating. There are some 20 minimum weight factors in

the NMFC which convert to some 20 truckload minimum weights ranging from 10,000 pounds to 50,000 pounds.

The ICC, in numerous proceedings, has set forth factors which are to be used in determining appropriate classification ratings—*i.e.*, determining the transportation characteristics of commodities. In Ex Parte No. MC-22, *Motor Carrier Rates In New England*, 47 I.C.C. 657 (1948), the Commission established the following list—

(1) Shipping weight per cubic foot

(2) Liability to damage

(3) Liability to damage other commodities with which it is transported

(4) Perishability

(5) Liability to spontaneous combustion or explosion

(6) Susceptibility to theft

(7) Value per pound in comparison with other articles

(8) Ease or difficulty in loading or unloading

(9) Excessive weight

(10) Excessive length

(11) Stowability

(12) Care or attention necessary in loading and transporting

(13) Trade conditions

(14) Value of service

(15) Competition with other commodities transported

While the ICC has stated that no one of these characteristics is predominant over the others, the density characteristic has generally been accorded greater weight than

the others. The lighter and bulkier the commodity, the greater the charges per hundred pounds required to recover the cost of transporting it.

Of course, the consideration of any of the factors which define transportation characteristics cannot be done pursuant to a formula. Rather, classification is more an art than a science and ultimately human judgment plays a key role in classification decisionmaking. And the classification requires constant reevaluation in light of changes in product design, materials, packaging, etc. As a result, frequent supplements are issued amending classification ratings to reflect these changes.

The NMFC plays a pivotal role in the system which determines motor carrier rates. Most motor carrier traffic, both interstate and intrastate, moves on the basis of class rates. These class rates, generally established by the collective action of carriers through rate bureaus such as the Defendants, are no more than mileage rates expressed in cents per hundred pounds for each of the 23 classification ratings. The class rates are stated in tables with vertical and horizontal tables. (See Table attached as Appendix B). One scale reflects the various classification ratings. The opposite scale reflects rate base numbers—a number which reflects distances between given origins and destinations. Therefore, in order for a carrier or shipper to determine the class rate under which a shipment is hauled, he needs to check the NMFC rating and the applicable rate basis.

Classification, is therefore, a ratemaking tool; "A rating must be complemented by a class rate, and vice versa, in order to give substance to either." *Class Rate Investigation*, *supra*, at 473. To chage [sic] the classification of an article in the NMFC from Class 100 to Class 110 is to increase by approximately 10 percent the class rates in

the tariffs published by the Defendant rate bureaus. Since this is so, classifications are governed by the same regulatory standards as are rates. Thus, the Interstate Commerce Act makes it the duty of every common carrier to establish and maintain just and reasonable classifications. Section 1(4), 49 U.S.C. § 1(4), railroads; Section 216(b), 49 U.S.C. § 316(b), motor common carriers; Section 305(a), 49 U.S.C. § 905(a), water common carriers Section 404(a), 49 U.S.C. § 1004(a), freight forwarders. In addition, the Act forbids unjust discrimination against, and undue or unreasonable preference, advantage, prejudice, or disadvantage to, any person, port, gateway, locality, region, district, territory, or description of traffic any respect whatsoever. Sections 2, 3(1), 49 U.S.C. §§ 2, 3(1), railroads; Section 216(d), 49 U.S.C. § 316(d), motor common carriers; Section 305(c), 49 U.S.C. § 905(c), water common carriers.

II. History Of Classification

Classifications have existed in one form or another since the early nineteenth century. In 1813 the Sheffield Canal in England established six classes of commodities, to each of which was applied a different rate in pence per ton mile. Grouped in one class were such diverse commodities as coal, limestone, manure, turnips, carrots and potatoes. In another were pig iron, pig lead, bricks, old ropes, bones and "hoofs." In another were steel, cast iron, various fruits, and "all kinds of green groceries" not named elsewhere. In another were "dry groceries, and all kinds of manufactured goods." In another were corn, grain and malt. The last, to which the highest rate was applied consisted of "all other goods, matters, and things."

Some of the early American classifications, developed for railroads and water carriers are discussed in Colquitt,

The Art and Development of Freight Classification, wherein the following example is provided:

> In 1864, the Michigan Southern & Northern Indiana R. R. issued a "Revised Classification of Articles," using 4 classes. However, the articles were not grouped under each class but were listed alphabetically. Not yet had commercial groups, or generic headings such as we used today in our classifications, become generally estalished. This issue contained the class rates, also "Special Rates" and specific commodity rates. This publication consisted of 22 pages.

As the number of commodities hauled by rail grew and as the operations of each line became more complex, so grew the impetus for the development of a uniform system of freight classifications. By 1918, the three major regional rail classification publishing organizations were consolidated in a single publication known as the Consolidated Freight Classification; a publication which retained to some degree the differences in the regional rail classifications. By 1945, the Commission ordered the establishment of a uniform rail classification applicable nationwide. *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945). The Commission so acted out of the need to bring greater order to the rate structure based on the classification—the class rate structure. The problem created by more than one classification was thus summed up by the Commission in its report as follows:

> The situation created by the diversity of ratings and classes in the several classifications, the lack of uniformity in percentage relations between the classes, and the designation of classes in the classifications by different numbers or letters, have combined to compel the establishment of countless exceptions which have shorn the ratings in the classification of much of their usefulness and proper function. This is shown by the fact that the volume of

> traffic, particularly in carloads, moved at class rates subject to ratings in the classifications is relatively small both intraterritorially and interterritorially, and is considerably less than that moved at rates under exceptions. It is clear that the existing classifications are outmoded and should be revised. (262 I.C.C. at 504).

Since "the basic considerations which should determine the classification of an article . . . are generally the same in all territories," the Commission found that a uniform classification would be both feasible and fair. As a result, the railroads issued, in 1952, the Uniform Freight Classification No. 1.

Paralleling this development of a unified rail classification was the development of a unified motor carrier classification. The trucking industry grew rapidly after 1900 and, by 1935, was a large enough competitive threat to the railroads to warrant enactment of the Motor Carrier Act of 1935, now codified as Part II of the Interstate Commerce Act. Section 216 of the Act mandates that motor carriers shall establish a just a reasonable classification. NMFTA's operations are designed to meet this statutory mandate.

III. The Role and Organization of NMFTA

Prior to the enactment of Part II of the Interstate Commerce Act in 1935, the motor carrier industry was unregulated as to interstate traffic. Many individual motor carrier classifications had appeared on the scene. Part II of the Interstate Commerce Act required the newly regulated carriers to "establish, observe, and enforce just and reasonable *rates, charges and classifications*. . . ." (Emphasis added). The then existing National Traffic Committee of the industry decided to coordinate the existing motor carrier classifications and follow

the format of the then existing rail classifications, changing it wherever necessary to fit as nearly as possible the needs of the motor carrier industry. The National Motor Freight Classification No. 1 was then born and became effective in April, 1936.

In the early 1940s the possibility of violation of the antitrust laws by collective action on the part of transportation agencies in matters of rates was entertained by the Justice Department. Because of the world-wide war then going on the federal government, acting pursuant to executive fiat, granted carriers the right to collectively discuss rates, charges, classifications since it was considered in the best interests of the war effort. With the cessation of hostilities the Justice Department again proceeded to investigate the possibility of antitrust violations. Congressional action designed to legitimize collective carrier action was undertaken an on June 17, 1948, the Reed-Bullwinkle Act was passed granting carriers immunity from antitrust action when collectively considering changes in rates, fares, *classifications*, divisions, allowances or charges . . . or rules and regulations pertaining thereto." (Emphasis added). This Act was incorporated into the Interstate Commerce Act as Section 5a, providing for carrier immunity under "such rules and regulations as the Commission may prescribe" after application to, and approval by, the Commission of carrier agreements.

The National Traffic Committee of American Trucking Associations decided that an autonomous corporate entity should be created to permit the carriers' joint consideration and maintenance of just and reasonable classifications of property. The corporation created for this was NMFTA.

The Certificate of Incorporation of NMFTA cites as its purposes:

"The particular business and objects of said corporation shall be educational and scientific with respect to matters relating to or affecting motor common carriers of property by motor vehicles operating within the United States.

"The purposes shall further be the mutual improvement and advancement of the interests and welfare of those engaged in such common carriage by motor vehicle.

"In furtherance of the above purposes, NMFTA is mandated to:

(1) Investigate, analyze and disseminate information with respect to classifications, tariffs, charges, rates, rules, regulations and practices governing the transportation of property or wholly or in part by motor vehicle.

(2) As agent for the carriers participating therein, compile, distribute, issue, publish, file or contract for the compilation, publication, filing, sale and distribution of classifications, tariffs, charges, rates, rules, regulations and practices governing the transportation of property, together with supplements thereto and revisions thereof, solely as the same from time to time be directed by the National Classification Committee.

(3) Constitute the National Classification Committee as a Standing Committee of the Corporation pursuant solely to the National Motor Freight Classification Agreement, plenarily and exclusively charged with the construction, initiation and establishment of classifications, charges, rates, rating, rules, regulations, and practices pertaining thereto or procedures for the joint consideration, initiation or establishment of classifications, charges, rates, ratings, rules, regulations, and practices pertaining thereto or procedures for the joint consideration, initiation or establishment thereof.

(4) Procure, analyze, compile and disseminate treatises, statistics, studies, reports, and information with respect to the operations, accounts, revenues, expenses, costs, traffic and rates of carriers, but not to perform any functions of a carrier or a public accountant.

(5) Take and do such other act or acts, consonant herewith, as may be necessary to promote the welfare and interests of its members."

Of particular interest in the context of this proceeding is the National Classification Committee (NCC). The NCC is the arm of NMFTA which operates pursuant to the antitrust immunity granted by Section 5a. The NCC agreement for collective classification making was approved by the Commission in a proceeding styled *National Classification Committee - Agreement*, 299 I.C.C. 519 (1956).

The NCC consists of 100 members (motor carrier employees) elected by the Classification participants from each of the 48 contiguous United States, Alaska, the District of Columbia and Canada. The number elected from each state is determined by the Classification participation fees received from carriers domiciled in that state. The NCC is reconstituted on July 1 of each year.

The NCC is empowered to:

(a) Investigate, consider and make recommendations with respect to matters affecting the classification of commodities and finally decide, fix and prescribe the context, provisions and ratings of the National Motor Freight Classification; provided, however, that any carrier participating in such Classification shall have the right, at any time before or after determination thereof, to publish, cause to be published, or to concur in any tariff or tariffs containing exceptions to said Classification and any or all provisions thereof;

(b) Determine the procedure under which the National Classification Board (NCB) shall operate, appoint members of the NCB and determine and fix the procedure under which appeals from decisions of the said NCB shall be heard and decided.

NCB is composed of not less than three and not more than seven full-time employees, one of whom is Chairman. The NCB considers proposals for changes and additions in the description of articles, minimum weights, packaging requirements, ratings, rules or regulations in the National Motor Freight Classification (NMFC), holds public hearings, and recommmends the disposition of proposals. It is the NCB which daily works with the fifteen transportation characteristics above listed to arrive at the proper classification relationships between articles of commerce.

How are changed made in the Classification? This is a very important part of proper maintenance of the Classification, as the commodities moving in commerce are constantly changing in character and there is a daily introduction of many new items. To provide for these changes the Section 5a Agreement sets forth the ICC approved procedures for the establishment of, or changes in, ratings, rules, packaging, etc. Anyone, be it shipper, carrier, governmental agency, or individual, has the right under those procedures to initiate a request for change in the Classification. The action may start with the proponent filing a proposal with the NCB, describing the desired change and supporting it with information. That proposal is received by the NCB and public notice is given of the filing in a Docket Bulletin which is published and receives wide distribution. In that Bulletin, advice is given of the dates on which public hearings will be held with reference to the items listed in the Bulletin. At the time of the public hearing all interested parties have the

right to appear and present their views, pro or con. After the hearings have been concluded the NCB evaluates each proposal and issues a public disposition, either approving, disapproving or approving a modified version of an original proposal. The public disposition is sent to all parties of record in the docket, also being published in a wide circulation of trade journals. If the proponent or any other interested parties takes issue with the dispositon, procedures are provided for that party to appeal to the 100 members elected by the NCC. The NCC has the authority of final decision over the NCB.

In addition to the setting and amending of classifications, NMFTA publishes rules relating to said classifications and charges for various accessorial services rendered in the course of transportation. Again, these rules and charges, like the classification, apply on both interstate and intrastate traffic. A typical page of rules published in the NMFTA tariffs is provided in Appendix C. Typical rules provide packaging specifications, set forth bills of lading forms, and define the procedures to be followed for the filing of claims against carriers.

Intrastate Application Of The NMFC

The NMFC is filed as the governing intrastate classification tariff with the state motor carrier regulatory commissions of 46 states (all states excluding Delaware, Rhode Island, Hawaii and Massachusetts). In the states in which it applies, the NMFC is employed in the ratemaking process in the same manner as it is employed on an interstate basis—*i.e.*, it is used in conjunction with individually or collectively established class rates in those states, such as those class rates published by Defendants. The NMFC published in these states for application on intrastate traffic is identical to that published for interstate application. It is the product of the same collective process described above.

As regards the states involved in this lawsuit, NMFC is published for the intrastate account of the following numbers of carriers:

Alabama Public Service Commission for appplication by 50 carriers;

Georgia Public Service Commission for application by 66 carriers;

Mississippi Public Service Commission for application by 33 carriers;

North Carolina Public Service Commission for application by 225 carriers; and

Tennessee Public Service Commission for application by 75 carriers.

Attach [sic] hereto as Appendix D is the cover page of an NMFC tariff indicating the various state regulatory bodies with which the NMFC is filed and a sample list of participating intrastate carriers for the State of Alabama.

The Necessity Of A Uniform Freight Classification

The primary need for a uniform freight classification derves from the requirement that carriers establish rates which are just, reasonable and lawful in relation to one another. Each jurisdiction in which the NMFC is filed, both federal and state, statutorily requires carriers to establish just, reasonable and non-discriminatory rates and classifications. Such a requirement mandates the need for some structure of rates which are lawful in relation to one another. Absent a uniform classification, such a structure would be impossible. It would be impossible to avoid discrimination between shippers moving like products under like transportation conditions. It would be impossible to avoid discrimination between places located in different classification territories. And it would be impossible to assure that similar commodities are accorded similar rates.

There is another basic reason for a uniform classification: workability. Collective action greatly simplifies a pricing function that must be capable of billing over 200 million shipments a year, or about 800,000 shipments per working day. As the ICC has noted:

> By the use of the classification in conjunction with the class tariff, it is possible for carriers to publish reasonable charges for transporting all articles of commerce between all points in the United States without the necessity of publishing billions of separate and distinct rates. *General Increase - Eastern Central Territory* 316 I.C.C. 467, 483 (1962).

Thus, a shipper could not effectively distribute his products if they were to be subject to different classifications depending on which carrier it would or wishes to utilize. Just to give an example, when one wishes to make a long distance telephone call from Atlanta to Washington, one need only dial the phone and the through service is provided at a predetermined cost. It isn't necessary that the local phone company connect you with the lines of the several phone companies that provided the connecting through service to Washington. It is done automatically, on a through basis.

The same is true for a shipper who wishes to ship his commodities by motor vehicle from Newman, Ga to Pocatello, Idaho. There is no regulated motor common carrier tha has single-line service between those two points but the shipper knows that he can utilize the services of a local Atlanta area carrier who will take his shipment and deliver it to a carrier at Atlanta, Georgia for final transport to Pocatello, Idaho. The shipper also knows that he too can predetermine the price and charges for that service—all because the present system of collective rate and classification making enables carriers to jointly provide this service and jointly establish the

charges that will permit the service to be carried on in a simple, economical, just and reasonable manner.

Moreover, a uniform classification is a practical necessity. Simply stated, the task of publishing, maintaining and distributing a classification is so immense that no single carrier could feasibly perform it; no one carrier could bear the burden involved in classifying, in a just and reasonable manner, over 15,000 separate articles. Nor could states monitor each separate classification filed for compliance with statutory standards. The immensity of the task would simply be too great and the number of regulatory personnel needed beyond the means of any regulatory body.

The same reasons which underlay the need for a uniform interstate classification underlay the need in each state for a uniform freight classification applicable to intrastate traffic. Simply, a uniform classification is the best means that regulatory bodies can employ to assure that statutory standards of just and non-discriminatory rates are met, and it is the only means whereby carriers can meet those standards. This is a conclusion which each of the states that regulate transportation has reached and, it is a conclusion which has prompted 46 of those states to apply to the NMFC to intrastate traffic.

CONCLUSION

The foregoing has provided a summary of the activities of NMFTA in the matter of collective classification making, indicating the manner in which NMFC is an integral part of the collective ratemaking system. The effectiveness of this system in terms of enabling a basic and simple method of pricing and billing over 200 million shipments each year was demonstrated. It was likewise shown that the pricing system also guarantees for treatment to all

who purchase motor common carrier transportation. That is to say, shippers will be charged at a price that is just and reasonable and does not discriminate or give undue preference to any shipper or class of shippers.

What would happen if the carriers' granted exemption from antitrust laws were removed and they had to work out another way to price their services? One must appreciate the tremendous influence this would have on the thinking of the members of the trucking industry and its customers as well. The overwhelming threat of antitrust prosecution with its attendant penalties would be a major force in directing their activities in such a manner as to absolutely insure beyond any doubt that their pricing system would be irreproachable. No uniform classification could exist in such an atmosphere. As shown, the consequences of that result would be a tangled mess of conflicting classifications; a situation which would at worst, end interlining and, at best, hopelessly confuse interlining. And, in some cases, the result would be no Classification at all, at least not a coordinated or meaningful classification based on knowledge and experience. This is a situation which no regulated motor carrier system could tolerate.

VERIFICATION

CITY OF WASHINGTON)
)ss:
DISTRICT OF COLUMBIA)

James C. Harkins, being first duly sworn, deposes and says that he has read the foregoig affidavit, knows the facts asserted therein, and that the same are true as stated.

James C. Harkins
JAMES C. HARKINS

[Jurat and Exhibits Omitted in Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REPLY OF NARUC TO MOTION OF U.S. FOR SUMMARY JUDGMENT

ATTACHMENT A

Filed September 15, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF ANDREW C. RYMER DIRECTOR, MOTOR CARRIER DIVISION TENNESSEE PUBLIC SERVICE COMMMISSION

I, Andrew C. Rymer, being first duly sworn according to law, depose and state as follows:

1. I am the Director of the Motor Carrier Division of the Tennessee Public Service Commission and as such am fully familiar with the rules and regulations of the Commission and the actual practice of the Commission which relate to and constitute the exercise by the Commission of its regulatory authority over the motor common carriers of property operating in intrastate commerce within the boundaries of the State of Tennessee.

2. All of the aforesaid operations by the motor common carriers of property are conducted pursuant to operating authority duly granted by the Commission and all applications by either existing or new motor carriers for additional or new operating authority must be first granted by the Commission before such proposed operation may be lawfully commenced.

3. The charges assessed by the motor common cariers of property within the State of Tennessee are fixed by the Commission and the procedures whereby that is done have been in existence for many years, resulting in a

currently effective structure of rates and charges, rules, regulations, classifications, and practices which have all been specifically prescribed or approved by the Commission.

4. Although the statutes of Tennessee do not specifically require the motor common carriers to join with each other in the provision of service over through routes at joint rates, they do authorize the Commission to fix such rates. The statutory authorization is quoted below:

> "65-518. The Commission shall have power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-401, whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates tolls, fares, charges or schedules, or commutation, mileage or other special rates, the commission shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility. (Acts 1919, ch. 49, § 4; Shan. Supp., § 3059a87; Code 1932, §§ 5450; Acts 1974 (Adj. S.), ch. 470, § 1.)"

5. By voluntary action the motor common carriers operating within Tennessee have joined with each other in the provision of through service at joint rates over their connecting lines, particularly in the transportation of class-rated traffic.

6. There is a requirement by statute that the charges to be assessed for the services of the motor carriers shall

be stated in tariffs filed with the Commission pursuant to such reasonable regulations as shall be prescribed. By Rule No. 1220-2-1.11, all freight tariffs of motor carriers are required to contain the rules and regulations which govern the tariff and set forth the privileges and services covered by the rates. When class rates are published, a classification must be published or adopted in which all articles or commodities of commerce are arranged alphabetically and a class shown for each to which such article or commodity has been assigned. All rates must be expressed in terms of lawful money and the points from and to which the said rates apply must be clearly shown.

7. The class rates mentioned above are published and maintained by the carriers for application to transportation for which specific commodity rates have not been published. As such, class rates apply to almost all of the less-than-truckload traffic, which by its very nature consists of a wide range of articles and commodities and moves between almost all of the traffic centers in Tennessee. As of the present time, all of the motor carriers providing less-than-truckload service within Tennessee utilize a single classification which lists the multitudinous articles of commerce in alphabetical order and assigns to each a specific class reflecting its transportation characteristics, including its density, its value, its ease or difficulty of handling to and from trucks and across platforms, its susceptibility to damage, and ten or a dozen other features which affect the cost of its transportation or the ability of the article to bear the transportation charges demanded by it. The rates assigned to the separate classes of traffic thus determined are applied to both single-line and joint-line transportation of those commodities. As such, both the rates and the classification are the product of group action, either by way of prescription or by way of proposal.

8. By reason of their long subjection to regulation, all of the motor carrier rates published in the tariffs which are now effective have been specifically prescribed or approved by the Tennessee Commission. By Rule No. 1220-2-1-.12, any change to be made in those tariffs must be accompanied by a new filing made at least 30 days prior to the proposed effective date and with full notice to all known interested parties. Each such filing must be accompanied by an explanation of the character of and the reason for the proposed change in the existing tariff schedules.

9. Without reference to whether or not a formal opposition to a proposed change in tariffs is filed with the Commission by a shipper or other interested person, each proposed change is fully and analyzed by the staff in the Motor Carrier Division of the Commission.

10. By statute each proceeding before the Commission involving the fixing of rates is deemed to be a contested case (Acts 1953, ch. 162, § 1 (Williams) § 5501-24) and, also by statute (Acts 1953, ch. 162 §§ 6 and 8 (Williams §§ 5501.29 and 5501.31)), all interested parties may become parties to the proceeding and thereby become entitled to an opportunity for hearing after reasonable notice. An opportunity is afforded each such party to present evidence and argument in accordance with the rules of the Commission provided, however, that informal disposition may also be made of any of these by stipulation, agreed settlement, consent order, or default. However, every final decision or order rendered by the Commisision in a contested case must be in writing and must contain or include in the record a statement of the findings of fact and conclusions of law upon which the Commission's decision rests.

11. In actual practice, general changes in motor carrier rates are seldom proposed by individual carriers. When individual carriers do propose rate changes, they usually seek to establish commodity rates to reflect real or fancied savings in operating costs arising from a regular movement or some extraordinary circumstances enabling the carrier to accord to the particular traffic a lower charge than that called for by the class rate structure. On the other hand, any changes made in the class rate structure, or a proposal for a general increase in the level of the class rates generally, usually is the product of a collective proposal by the carriers. As above indicated, in either instance the matter is analyzed and, with a full report, is referred to the Commission for disposition.

12. The collective action of the carriers in developing and submitting proposals to the Tennessee Public Service Commission is intimately related to the performance by the Commission of its regulatory duties. It is doubtful that those duties would be performed at all in the absence of such proposals. For example, if each motor common carrier of property operating within Tennessee were to be required to file with the Commission its own freight classification, separate and distinct from that filed by every other carrier, the task of regulation would become intolerable.

13. Because of the intimate relation of joint or collective action by the motor carriers to the entire regulatory process of the Tennessee Public Service Commission, the Commission promulgated Rule No. 1220-2-1-.40, reading as follows:

> "1220-2-1.40 The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for

> the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedure shall be left in its final determination to the Tennessee Public Service Commission."

This procedure benefits the Commission in several ways. First, the filing of joint tariffs permits the Commission and its staff to review one document rather than as many documents as there are regulated carriers. Second, joint tariffs assist the Commission in furthering the statutory directive that rates should be uniform. Third, the centralization and coordination of tariff information decreases the amount of time spent in hearings thus enabling the Commission to use its time and resources more efficiently. Fourth, the use of joint tariffs aids the Commission in docket control in that these tariffs enable the Commission to conduct hearings and render decisions more expeditiously. Finally, the use of joint tariffs results in the centralization of tariff information concerning not only rates but also which carriers serve what routes and communities.

The use of joint tariffs which is permitted by Rule 1220-2-1.40 also benefits the shippers as well as the carriers. First, the use of joint tariffs results in the centralization of rate and route information. The Commission is not required to publish or compile tariffs; it only requires that tariffs be maintained at the shipper's place of business. Second, this compilation and centralization of tariff information enables small shippers who may be ignorant of the availability of service to determine what

routes and rates are most favorable to their business. Third, the use of joint tariffs has permitted the wide development of "through rates" which would have been more difficult to develop if only individual rates could be considered. The availability and use of "through rates" tends to keep the cost of shipping lower than it would be if only individual tariffs could be used.

14. Insofar as the class rates themselves are concerned, collective proposals by the carriers are also essential if the applicability of the rates themselves over both single and joint-line routes is to be maintained. The maintenance of such applicability is itself a desirable regulatory goal in that it widens and encourages service competition between and among single-line and joint-line carriers, thus contributing to the adequacy and avilability of satisfactory motor carrier service at reasonable and nondiscriminatory charges. At the same time, it contribute to market accessibility for producers and distributors.

15. The practical effect of regulation of motor common carriage of property within the State of Tennessee has been to control the competition of the carriers between and among themselves insofar as the pricing of their services is concerned while, at the same time, promoting to the maximum extent possible service competition between and among those same carriers. The net result has been a stable rate structure which avoids undue discrimination, provides the public with good service at reasonable charges, and permits the carriers to earn a reasonable reward for the dedication of their efforts and property to public use.

Andrew C. Rymer
ANDREW C. RYMER

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REPLY OF NARUC TO MOTION OF U.S. FOR SUMMARY JUDGMENT

ATTACHMENT A-1

Filed September 15, 1978.

[Caption Omitted in Printing]

AFFIDAVIT OF ROBERT A. JONES

STATE OF ALABAMA

COUNTY OF MONTGOMERY

Personally before me, the undersigned officer, duly authorized to administer oaths, appeared Mr. Robert A. Jones, who, being duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is Robert A. Jones. I reside at 107 Sterling Drive, Montgomery, Alabama. I am over twenty-one years of age and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use by the National Association of Regulatory Utility Commissioners or for any other purpose in this litigation.

2.

I am presently employed by the Alabama Public Service Service Commission (hereinafter "Commission") as Supervisor of Transportation Rates and Services. I have held this position since November, 1966. Except for a very brief period prior to my employment with the Commission I have been engaged in the transportation field,

having worked with railroads, motor carriers, private industry and traffic consultants. Practically all of my working experiences relates directly to transportation rates and services. I am a registered Interstate Commerce Commission practitioner and hold a Bachelor of Laws degree.

3.

In my present position, I serve as the director of the Commission's Bureau of Transportation Rates and Services. This bureau is primarily responsible for matters relating to the rates and charges, services and related practices of all modes of surface transportation other than pipeline. In addition to secretarial and railroad safety personnel, this bureau has three employees who, like the director, devote most of their time and efforts to matters relating directly to transportation rates, charges and services. This bureau reports directly to and works very closely with the Commission in all of its activities, especially in keeping the Commission informed and handling matters relating to motor carrier rates and charges.

4.

As of June 1, 1978, there were 350 motor carriers authorized by the Commission to operate in Alabama intrastate for-hire transportation. 279 hold certificates as common carriers and 71 hold permits as contract carriers; in addition to their common carrier authority, 24 common carriers also hold permits as contract carriers. All of these carriers are required to file with the Commission either their tariffs which set forth all of their rates and charges or their schedules of minimum rates. Only contract carriers may file schedules of minimum rates; however, many of them have elected to publish or participate in tariffs which are much more comprehensive than schedules of minimum rates. The motor carrier tariffs are

published and filed by the carriers individually or by their agents. I have observed that practically all of the general commodity carriers of consequence participate in agency tariffs; however, some of them also publish individual tariffs of a limited nature to provide for a few specific commodities or specific movements. Very few general commodity carriers publish individual class and/or general commodity tariffs. A number of the carriers who are either authorized to transport only one or a very limited number of commodities, many within a relatively small area or from and to only a few points or origin and/or destination, publish individual tariffs.

5.

The Commission was charged with the duty of regulating for-hire motor transportation upon the enactment of the Alabama Motor Carrier Act of 1939, which, as amended, is now Chapter 3 of Title 37, Code of Alabama 1975. The Commission is charged not only with the duty of regulating the rates and charges of the motor carriers but most other areas of their operation, including entry, service, safety, accounting systems, etc. The Commission is charged with the duty of regulating motor carriage to the end that the State of Alabama will be provided with a transportation network which is operated in a safe and efficient manner and is adequate to meet the needs of the public. To carry out these duties, the Commission has, as required, promulgated extensive rules and regulations, including specific rules applying to filing of tariffs and schedules publishing the carriers' rates and charges and rules and regulations affecting their rates and charges.

6.

The motor carriers do not actually establish their rates and charges by the filing of their tariff and/or schedules; from a practical standpoint, they file what they propose to

be put into effect. The Commission actually establishes the rates and charges because it must approve all tariff filings. To this end, upon the receipt of these tariffs or, supplements thereto, our staff studies them for changes in rates and charges or rules and regulations affecting the rates and charges and makes rate comparisons and analyses. The staff keeps the Commission advised of proposed changes, particularly of general increases or changes having a significant impact on existing rate levels, and furnishes the Commission any information it may need in reaching decisions.

7.

In reaching its final decision regarding proposed changes, the Commission, either with or without protest, may permit the tariff schedules to become effective as proposed, suspend the operation of the tariff schedules and institute an investigation or allow the tariff schedules to become effective on the proposed date and institute an investigation. When formal investigations are instituted, regarding either proposed changes or the justness and reasonableness of existing tariff schedules, public hearings are held and all interested parties are given an opportunity to be heard. After hearing and consideration of proposed or existing tariff provisions, the Commission may, in the public interest, permit proposed changes to become effective or continue in effect, deny proposed changes or increases and order them cancelled, allow lesser increases or require modification of proposed or existing rates, charges or rules and regulations, or take other action it deems proper. In any event, the Commission, not the carriers, makes the final decision as to what rates shall become effective and thereby established.

8.

I have found from my study of the Commission's records and files that it has recognized the value of collective

rate-making and the uniformity through agency tariff publications, especially uniformity in the classification of articles and rules associated with rates and charges, since 1940. In fact, it has on occasions required motor carriers to either participate in certain agency tariffs or adopt the provisions of those tariffs which were the result of collective rate-making. I have also found that the Commission has always recognized the right of the carriers to take independent action in the establishment, with Commission approval, of rates and charges and rules and regulations which shall apply for their individual account.

9.

Experience has proven to me that it is very helpful to the carriers and the public, but essential to the Commission, for motor carriers to be able to collectively make rates which they propose to be made effective on Alabama intrastate traffic. Under this system, it greatly reduces not only the number of tariffs required to be filed with the Commission but the expenses involved in such things as tariff publication, maintaining tariff files, rate negotiations between shippers and carriers and, above all, the Commission's in its regulatory activities. As indicated above, the Commission, with the aid of its staff, is able to review and study the tariff filings of the motor carriers because the preponderance of intrastate traffic moves under rates published in agency tariffs; however, if these carriers are ordered to cease collectively making rates and having them published in agency tariffs, and each of them required to publish and file their individual tariffs it would not be humanly possible for the Commission and its staff to continue its present practice. I seriously doubt that the State Legislature would or could appropriate sufficient funds for the staff that would be required to perform the required work and time would not permit the Commission to conduct as many hearings

as would be required to determine the justness and reasonableness of the carrier's proposed rates and charges.

10.

In my considered judgment, if the motor carriers can no longer collectively make rates and publish them in agency tariffs, not only would the regulatory scheme in Alabama be disrupted and thwarted but the general public would be done a great injustice. Any added expenses of the Commission would be reflected in higher taxes or carrier inspection fees, any additional expenses imposed on the carriers in would be reflected in higher rates and charges, and increases in transportation expenses will be reflected in higher costs being paid by the ultimate consumer. Many of the smaller carriers cannot afford the expense associated with the publication of individual tariffs. By the same token, there are many small shippers who cannot afford the expense that would be involved in having to negotiate with all the carriers who would be involved in moving their traffic as well as maintaining tariffs of these carriers. As it is now, under the procedures of the rate bureaus, both small carriers and shippers can provide input in rate negotiations at a minimum cost; also, with the use of only one or a few tariffs, shippers can determine their transportation cost as well as their competitors.

11.

It is my personal opinion that too much emphasis has been placed upon rates when considering competition among motor carriers. Through the years I have found that it is not necessarily the carrier or carriers who publish the lowest rates that determine which carriers will participate in the movement of the traffic. Transportation charges are admittedly a key factor but the overall trans-

portation service actually determines how most traffic is routed. Shippers will pay a premium in the actual transportation cost if that is required to assure them that the carriers they use are able to consistently provide them with sufficient equipment and handle their goods and a minimum of damage; after all, it is the prompt and safe delivery of goods at a reasonable cost that determines their profits and enables them to meet their competition. The use of carriers who may publish rates a few cents less than others but cannot provide these services do not control the traffic.

12.

I am thoroughly convinced that the present method of establishing transportation rates and charges, including collective rate-making, is necessary to protect the interest of the public and carriers alike. In fact, I feel it is essential under our regulatory scheme if we are to continue to have a healthy and viable transportation system adequate to meet the needs of the state's shipping public.

Robert A. Jones
ROBERT A. JONES

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 76-1909A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;
MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
DEFENDANTS

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, INTERVENORS

[Filed Sept. 13, 1979]

FINAL JUDGMENT

Plaintiff, United States of America, and Defendants, Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), Motor Carriers Traffic Association, Inc., ("MCTA"), North Carolina Motor Carriers Association, Inc., ("NCMCA"), all having filed their respective Motions for Summary Judgment on August 1, 1978, and this court on March 20, 1979 having granted Plaintiff's Motion for Summary Judgment and denying all defendants' motions, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

1.

This court has jurisdiction over the subject matter and the parties here involved. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act. (15 U.S.C. § 1).

2.

As used in this Final Judgment:

(a) "Tariff" means a publication containing one or more rates, charges, exceptions to the National Motor Freight Classification or alternative publication, rules, regulations, or other provisions or any combination thereof, of one or more common carriers together with supplements or looseleaf page amendments thereto, if any.

(b) "Rates" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service.

(c) "Carrier" means a common carrier of property by motor vehicle.

(d) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306; Georgia Intrastate Tariff 301 series; North Carolina Intrastate Tariff 304; and Tennessee Intrastate Tariff 305; and all respective supplements thereto and reissuances thereof; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto and reissuances thereof; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-H and all respective supplements thereto and reissuances thereof.

(e) "Intrastate for-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(f) "Collective Rates" means any rate or charge, other than a "joint rate," established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers.

(g) "Joint Rate" means any rate established by two or more carriers, covering an interline movement of property over the routes of the carriers directly participating in the interline movement.

(h) "Intrastate Rate Committee" means any group of carriers' agents, employees or other representatives which formally or informally meet with defendants' employees to discuss or vote upon a change or changes in rates, fares, classifications, rules or regulations published in the intrastate tariffs issued by defendants.

(i) "Docket" means an informational bulletin published by a "tariff publishing agent" to inform and facilitate discussion between competing carriers with respect to the filing of rates for the intrastate for-hire transportation of property.

(j) "Tariff Publishing Agent" means a person duly authorized by a carrier, via a power of attorney on file with a state regulatory commission, to publish and file rates and provisions for that carrier's account in tariffs published in the name of the agent.

(k) "Tariff Watching Service" is a service provided by a tariff publishing agent whereby the agent notifies carriers subscribing to its service of competing carrier and rate bureau changes in their existing

tariffs and rates which have been filed with a state regulatory commission.

(l) "Intrastate rate" means any rate charged by a carrier for the intrastate for-hire transportation of property solely within a state and subject to regulation by that state.

(m) "Person" means any natural person, firm, partnership, association, corporation, or any other business or legal entity.

3.

The provisions of this Final Judgment are applicable to the defendants herein and shall also apply to each of the defendants' officers, directors, agents, employees, subsidiaries, successors, and assigns and to all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise; provided however, that nothing in this Final Judgment shall be read or construed to restrain or prohibit any state body, official or employee from acting in accordance with or pursuant to valid statutory authority.

4.

Defendants SMCRC, MCTA, and NCMCA are hereby enjoined and restrained from:

(a) Entering into, adhering to, maintaining, or claiming any rights under, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize or maintain collective rates charged by competing carriers for the intrastate for-hire transportation of property;

(b) Maintaining any intrastate rate committee to consider, pass upon or discuss intrastate rates or rate proposals;

(c) Inviting, coordinating or providing a forum, including publication of a docket, for any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property;

(d) Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of any defendant prior to the time at which such rate change becomes a matter of public record;

(e) Knowingly publishing or causing to be published any docket, tariff or tariff supplement which was the result of any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property; or

(f) Communicating directly or indirectly any information concerning intrastate rates for competing motor carriers where the purpose or reasonably foreseeable effect of such communication is to maintain or renew, directly or indirectly, any contract, agreement, plan, program, combination or conspiracy to fix, stabilize or maintain rates charged by competing carriers for the intrastate for-hire transportation of property;

(g) Provided however, that nothing in this Final Judgment shall prevent any defendant from engaging in any activity which is judicially or statutorily exempted from the operation of the federal antitrust laws.

5.

Defendants are ordered and directed within six (6) months following the date of the entry of this Final Judgment:

(a) To cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agen-

cies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

(b) To terminate all previously executed powers of attorney and rate and tariff service agreements between a defendant and any carrier utilizing the services of that defendant authorizing the publication and/or filing of intrastate collective rates within the States of Alabama, Georgia, Mississippi, North Carolina and/or Tennessee.

(c) To cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy which have the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Final Judgment.

6.

(a) For those carriers who were or are members of defendants or have participated in defendants' collective tariffs, and who wish to continue to use their services as tariff publishing agents, defendants must offer an "open season" for a period of six months from the date of the entry of this Final Judgment to facilitate the filing of rates independently arrived at by each such carrier. During the "open season," defendants must obtain from each carrier using defendants' services as tariff publishing agents an affidavit which affirms that the new rates filed on behalf of that carrier were arrived at unilaterally by the independent action of that carrier during the "open season" and were not collectively established.

(b) Defendants must not take any steps or adopt any procedures which would have the effect of influencing any carrier from acting independently in establishing its rates in compliance with subsection (a) of this Article 6.

(c) Each defendant may initiate a tariff watching service, but no agreement between any defendant and a carrier for said watching service may include a provision for instituting automatic changes to rates on file for said carrier.

(d) Each defendant may issue one or more tariffs in which the independent rates of competing carriers are published.

(e) Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise in the compiling and publishing of tariffs, including rate justifications for that carrier's independent rate proposal filed with a state agency.

(f) Each defendant may charge carriers for expenses incurred on their behalf.

7.

Defendants are further ordered and directed:

(a) To take reasonable steps for dissemination of, education as to, and compliance with this Final Judgment involving their respective officers, directors, employees and agents having any responsibility in connection with analyzing or publishing tariffs published by defendants, advising such persons of their obligation under this Final Judgment. At a minimum defendants must provide each such officer, director, employee and agent within thirty (30) days of the entry of this Final Judgment with a copy of this Final Judgment, a statement of that defendant's compliance

policy under the Final Judgment in the form of an appropriate company manual or memorandum and shall obtain a written statement from each such officer, director, agent, or employee evidencing the receipt and understanding of these documents, such statements to be retained in the files of the defendants.

(b) For a period of five (5) years from the entry of this Final Judgment, each defendant must provide each new officer, director, agent and employee with a copy of this Final Judgment and a statement of the defendant's compliance policy hereunder in the form of an appropriate company manual or memorandum and must provide any carrier desiring to utilize defendant's services as a Tariff Publishing Agent with a copy of this Final Judgment. Each defendant must obtain a written statement from each officer, director, employee, agent, and carrier evidencing receipt and understanding of the applicable documents, such statement to be retained in the files of the defendant.

(c) Within one hundred and eighty (180) days after the date of the entry of this Final Judgment, each defendant shall file an Affidavit of Compliance with the court, and serve a copy thereof to plaintiff, reciting the steps taken to comply with this Final Judgment.

8.

For the purpose of determining or securing compliance with this Final Judgment, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division or his agent, subject to any legally recognized privilege:

(a) On reasonable notice to any defendant made to its principal office duly authorized representatives of the Department of Justice shall be permitted:

(1) Access, during office hours of said defendant, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendants and without restraint or interference from it, to interview officers, directors, employees or agents of the defendants, any of whom may have counsel present, regarding any matters contained in this Final Judgment.

(b) The defendants shall submit such reports in writing, under oath if requested, with respect to matters contained in this Final Judgment as may from time to time be so requested.

No information or documents obtained by the means permitted in this Section 8 shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the executive branch of the plaintiff, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as required by law.

If at any time information or documents are furnished by a defendant to plaintiff, the defendant represents and identifies in writing the material in any such information or documents of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to said defendant prior to divulging such

material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

9.

Jurisdiction is retained by the court for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

10.

This Final Judgment shall remain in effect for a period of five (5) years from the date upon which it is entered by the court.

IT IS SO ORDERED.

This, the 11th day of September 1979.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge